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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, ET AL., APPELLANTS,

vs.

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED OCTOBER 27, 1947.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

PETITION—Filed August 6, 1947

To the Honorable J. Waties Waring, Judge of said Court:

The petition of Earl J. Toomer, Joseph A. Cesaroni, Joseph DeGracia, S. W. Davies, S. D. Collins, and The Atlantic Seafood Producers, Inc., a Corporation organized and existing under the laws of the State of Florida, respectfully shows:

1. That Earl J. Toomer, Joseph A. Cesaroni, Joseph DeGracia, S. W. Davies and S. D. Collins are taxpayers and citizens of the United States and residents of the State of Georgia, and that The Atlantic Seafood Producers, Inc., is a legal entity, a resident in contemplation of the law of the State of Florida. That the defendants hereinafter named in saod proceeding are residents of the State of South Carolina and that there is, therefore, a diversity of citizenship.

2. That the amount in controversy as hereafter appears in said petition in in excess of Three Thousand ($3,000.00) Dollars and that the constitutionality of certain statutes of the State of South Carolina, the legality of which are being attacked in said petition as will hereinafter appear, is involved and the constitutional rights of your petitioners are also involved, as a result of which said Court has jurisdiction in the premises.

3. That prior to January 1, 1947 the Legislature of South Carolina, by Statute, created a State Board of Fisheries now composed of five members, whose duties are set forth in said Act and in various amendments to the original act, said State Board of Fisheries being made a corporate body and for the powers of said State Board of Fisheries reference is made to Exhibit "A", in which Section 3304 of the Civil Code of South Carolina of 1942, Volume II, is set out, and reference is also made to said same Civil Code of South Carolina of 1942, Section 3301 as to the jurisdiction of said State Board of Fisheries, and to Section 3308 of said Civil [fol. 3] Code of South Carolina of 1942 in which the Board is authorized to enforce all laws pertaining to fish and fish-

eries, and Section 3310 in which the Board is authorized to make all laws and to prosecute persons for violation, said Sections being set out as Exhibits "B", "C" and "D" respectively, and by reference incorporated in said petition.

4. That in accordance with the provisions of said Statute creating a State Board of Fisheries, the following members of said State Board of Fisheries have been appointed and now constitute said Board, to-wit: J. M. Witsell, Chairman, Edward E. Burroughs, E. L. Sweat, C. L. Young and J. A. Wilcox. That Alonzo B. Seabrook is Chief Inspector of said Commission and all of said persons are citizens of the United States and residents of the Eastern District of the State of South Carolina, and with the office of said Board at Charleston.

5. That prior to the creation of the State Board of Fisheries to control the trawling for shrimp, fish, etc. along the coastal waters beyond the low-water mark along the coast off the shores of South Carolina, the jurisdiction and boundaries of the State of South Carolina were expressly set out in the Civil Code of South Carolina of 1942, Volume II, Section 2038, in which the boundaries of said State were specifically limited to the Atlantic Ocean on the East from the mouth of the Savannah River to the Northern Boundary near the mouth of the Little River, including all islands, said boundary limits being set out in Section 2038 of said Civil Code of South Carolina, marked Exhibit "E" and attached to this petition. That it was only after the attempt was made to restrict and to interfere with the fishing enterprise off the coast of South Carolina that any assertion of authority was made by the State of South Carolina as to jurisdiction in said waters, said assertion of additional authority being contained in Section 3300 of the Civil Code of South Carolina of 1942, in which the State of South Carolina now contends that the waters and bottoms of the bays, [fol. 4] rivers, creeks and marshes within the State or within three miles of any point along the low water mark on the coast thereof shall be deemed and considered as part of the State of South Carolina and subject to its laws and jurisdiction, said claim of jurisdiction and authority being set out in Exhibit "F" and made a part of this petition.

6. Petitioners show that they are engaged in commercial fishing, owning and operating fleets of shrimp and fish trawlers off the coasts of Georgia, South Carolina, Florida

and North Carolina. That said petitioners are domiciled citizens of the States of Georgia and Florida and their said personal property is returned for taxes and they are licensed to operate said businesses by their respective states and localities. That said boats, including tackle and equipment used in connection therewith, are reasonably worth at least One Hundred Fifty Thousand ($150,000.00) Dollars, and that the income therefrom is in excess of Ten Thousand ($10,000.00) Dollars per week during the fishing season.

7. That the boats of the Plaintiffs are engaged in catching fish and shrimp, which are classified as ferae naturae and which are migratory in nature, being found in the coastal waters of the United States and having no fixed place of habitat or abode. That said Plaintiffs have been engaged in said occupation, which is a lawful and legitimate business, for a period of more that ten years. That prior to the passage of the recent Acts of the State of South Carolina, which are attacked herein, the rights of your petitioners as American citizens to carry on said useful and gainful occupation and business, out of which they earned certain profits and benefits, were recognized and no efforts were made by the authorities of the State of South Carolina to infringe on their Constitutional rights.

8. Petitioners show that their fleet of boats operate in the open sea along the Atlantic coast off the shore line from Florida, Georgia, South Carolina and North Carolina, a distance ranging from one-half to ten miles off the coasts of said States and none of said fishing or shrimping is carried on in sounds, bays, rivers, creeks or inland waters [fol. 5] generally recognized as belonging to the sovereignty of the State through which said sounds, creeks, rivers and bays flow and which are surrounded or enclosed by land; and said petitioners, to-wit: Earl J. Toomer, Joseph A. Cesaroni, Joseph DeGracia, S. W. Davies and S. D. Collins, were so engaged in the operation of said vessels upon the high seas during the fishing season for the year 1947 at the time that they, as owners and operators of said vessels, together with the masters thereof, were charged in criminal warrants, issued for their arrest on the instructions of the agents, servants and employees of the Sta. Board of Fisheries and the Chief Inspector thereof, with the alleged violation of the Statutes of South Carolina hereinabove set forth.

9. Petitioners further show that in order to make it impossible for them as residents of the States of Florida and Georgia, to profitably engage in their business of fishing and trawling for shrimp in the coastal waters off the shores of South Carolina, that said State enacted the various Statutes set out in said petition and amended Section 3379 of the Civil Code of South Carolina of 1942 by an Act, copy of which is attached hereto as Exhibit "G" and made a part of said petition, and in which amended Section as aforesaid, the State of South Carolina undertook to create various classifications, to-wit: that all owners of shrimp boats, residents of the State of South Carolina, are only required to pay a license of Twenty-five ($25.00) Dollars per year, but all owners of shrimp boats, who are non-residents of the State of South Carolina, are required to pay a license of Twenty-five Hundred ($2500.00) Dollars per year unless they have had one or more boats licensed in South Carolina during the previous years, in which event a license should be One Hundred Fifty ($150.00) Dollars for each boat, with the additional provision that non-resident licenses of the One Hundred Fifty ($150.00) Dollars classification issued by said Board shall in no event exceed one hundred (100) licenses per year, and with the further provision that no non-resident license should be issued to any non-resident until said non-resident shall first have furnished proof that he had paid all income taxes due to the State of South Carolina for profits made from operation in South Carolina [fol. 6] during the preceding year on said boat.

10. In addition to said unreasonable, onerous and illegal and confiscatory levying of taxes under said Statute as set out in the previous paragraph, and as part of said Act, the State of South Carolina has enacted a Statute known as Section 3414 of the Civil Code of the State of South Carolina of 1942, Volume II, referred to herein as Exhibit "H" attached hereto, in which Statute all owners of boats licensed by the State of South Carolina to trawl for shrimp in the waters of South Carolina or within three (3) miles of the low water mark of the coast thereof, are required to bring their boats into the ports of South Carolina and there unload their catch of shrimp and pack and properly stamp the same before shipping or transporting them to another state or the waters thereof, and in the event of a failure to comply with said provision of the law they shall not only be held criminally liable for violation thereof,

but the said State Board of Fisherie
to revoke their license to operate with
Carolina, and also the right to seize
tackle and the property contained t
shall be confiscated to the people of th
lina. In order to carry out said law
Civil Code of South Carolina of 194
acted, known as Exhibit "I", incorpo
a part of said petition, wherein the
agents for the State Board of Fishe
trary to the Constitution of the U
Amendments thereto, to enter any an
boats, houses, sheds or out-houses u
fishing industry in the tide waters or
the State, and to arrest without warr
guilty of violating said coastal fisher

11. Petitioners show that all of sa
gaged in the common purpose of comm
equally interested in the constitutio
said Statutes passed, for the reason
[fol. 6a] said Statutes have been dec
by the Courts, your petitioners will
profitably in the coastal waters off the
lina and will not be able to carry on t
or for profit and will be subject to arr
confiscated if they should attempt to
of their business.

12. Petitioners show that they, thei
employees, have been and were en
trawling for shrimp beyond the low w
open sea off the coast of South Car
fishing season and that on the 10th da
so engaged approximately two miles
mark off the coast of the State of Sou
were issued for the arrest of the owne
vessels for violation of Sections 3410
set forth, charging your petitioners
non-resident fishing licenses from the
lina and failure to bring the fish and
coast of South Carolina into the ports
purpose of being checked, packed an
to the State of South Carolina prior to
without said State, and warrants have
arresting officers in the City of Savan

Georgia for the arrest of said petitioners and their return to the State Courts of South Carolina to be tried for said offense.

13. Petitioners show that in addition to said warrants for arrest, they have been threatened with repeated arrests and criminal prosecution and with the seizure of their boats and equipment in the event they should continue fishing operations in the coastal waters off the coast of South Carolina without complying with said Statutes, and as a result of said threat of further prosecutions petitioners have been forced to discontinue their business in said coastal waters, causing them to suffer the loss of thousands of dollars from revenues that they would otherwise have received from fishing and shrimping in said coastal waters, and in addition thereto have been compelled to pay the salaries of em-
[fol. 7] ployees while said vessels were idle and as a result thereof are suffering losses of revenue during said fishing season in excess of Ten Thousand ($10,000.00) Dollars per week.

14. Petitioners show that the State of South Carolina is without authority to regulate or to tax the fishing industry upon the open seas and said attempted exercise of authority on the part of said State as set out in the Statutes attached hereto is in contravention and in violation of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(a) In that it deprives Plaintiffs of their property without due process of law and denies to the Plaintiffs equal protection of the law,

(b) Said Statutes are unconstitutional and invalid in that they set up arbitrary classifications and confer special privileges without any reasonable grounds appearing for said distinction and said Statutes do not apply alike to all persons within the same class.

(c) Said Statutes attempt to create a monopoly to the advantage of citizens of South Carolina so as to close the waters off the coast of South Carolina to residents of every other State except that of South Carolina, in violation of the Constitution of the United States, Article 4, Section 2, which provides that the citizens of every State sheall be entitled to all the privileges and immunities of the citizens of the several states.

(d) Said Statutes are in violation of the Fourteenth Amendment to the Constitution of the United States in that the same are discriminatory and in violation of said Amendment, which provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside and no State shall make or enforce any law which shall abridge the immunities or privileges of citizens of the United States nor deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the law.

[fol. 8] (e) Requiring the payment of a privilege license of Twenty-five Hundred ($2500.00) Dollars, the payment of State income tax for the preceding year, the bringing of said fish into one of the prots of South Carolina for packing and shipping requiring the rental or ownership of facilities for said purpose, and the paying of a tax on said fish or shrimp constitutes such a heavy burden of said business as to prevent petitioners from earning a fair return of their investment, and therefore said measures make the carrying on of said business prohibitive and said Statutes are confiscatory and prohibitory and constitute an unreasonable and unjustified interference with the rights of petitioners to earn a livelihood in said business.

15. That said classifications and distinctions do not appertain or relate to and are not necessary to the conservation and preservation of the fish, which objects and purposes are the only ones for which legislation may be passed.

16. That the said provision requiring the boats to bring the catch into the ports of South Carolina for the purpose of being taxed thereon and shipping the same therefrom does not relate to the conservation or preservation of said shrimp and fish and places an undue, unjustified and unfair burden on the use of such boats and vessels in interstate and foreign commerce; and infringes upon the right to Congress to legislate exclusively in said fields;

17. Petitioners further show that the said provisions with reference to the licensing of non-resident vessels grants a special privilege and favor to those persons using boats or vessels previously having commercial fishing licenses and wrongfully discriminates against others similarly situated not falling within said classification.

18. That said amended Section 3379 is confiscatory and retroactive and is an ex post facto law in violation of the Statutes of the United States in that said Statute, in addition to the discriminatory and unreasonable classification relating to licenses in Section 1 and 2 thereof, provides that [fol. 9] no non-resident license shall be issued for the year 1948 and thereafter until the owner of such non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in said State during the preceding year, irrespective of the sources of said income, which in effect is double taxation, requiring income taxes to be paid by persones in a State other than that in which he is domiciled.

19. That under the Constitution of the United States and laws passed in pursuance thereof, the business in which your petitioners are engaged in interstate commerce and the State of South Carolina is without the legal authority or jurisdiction to regulate the business of fishing upon the high seas, or to impose any taxes for the privilege of engaging in said business, or to require the payment of personal taxes on non-resident properties used in said operation, or to impose any taxes on the fish or shrimp caught and captured as a result of said operation on the high seas; and said attempt to place such restrictions and taxes upon the operation of said business as aforesaid, the properties used in connection therewith, and the catch therefrom, is illegal and contrary to the Fourteenth Amendment to the Constitution of the United States and constitutes a taking of said property without due process of law.

20. Petitioners show that they have no adequate remedy at law and that if they are required to resist said proceedings that there will be a multiplicity of suits resulting therefrom and that they will be placed in jeopardy of their lives, persons and property, and that the cost of litigating the various actions as they are brought and the filing of proceedings to recover the boats if they are seized, will be prohibitive and expensive and that they will be unable to retain in their employ a large number of persons necessary to engage in said business for the reason that said persons will refuse to have their liberty repeatedly placed in jeopardy dependent upon the possibility that said statutes may eventually be declared illegal and unconstitutional.

[fol. 10] 21. Petitioners show that all of said Statutes, whether passed at the same or various times, were all passed

as a result of a general scheme and purpose to illegally discriminate in favor of the residents of South Carolina and against the residents of other states, and for the sole purpose of making it impossible for your petitioners to profitably engage in a legitimate business which they are entitled to pursue as citizens of the United States, and that said Court has jurisdiction in the premises to grant them the relief which they seek.

22. Petitioners aver that said Court has the power to assume jurisdiction in said matter in order to protect the rights and property of your petitioners, and has the power to restrain the present pending criminal proceedings and all other proceedings which might be instituted by the authorities of South Carolina in pursuance of said illegal and unconstitutional statutes, and to set aside and decree as invalid certain Statutes which said Court may find infringe upon the legal rights of your petitioners as citizens of the United States, and in a sweeping decree to define the rights of all of the parties concerned in order that your petitioners and such other persons as may be vitally interested in said proceedings shall know just what the legal rights, duties and responsibilities of the various persons involved in said fishing business shall be.

23. That said Court is required by the Judicial Code of the United States To convene a three-judge court to determine the validity and constitutionality of said Statutes and the propriety of granting the application for an interlocutory injunction; and it is the duty of said District Court, pending the convening of the three-Judge Court, to issue a rule nisi directed to said defendaudts, giving them five (5) days notice of the application for an interlocutory and permanent injunction. Said District Court has the right in view of the irreparable losses which petitioners are sustaining to grant a temporary restraining order to restrain the State Board of Fisheries and their agents, servants and employees, from enforcing the Statutes of the State of South Carolina as set out in said petition.

[fol. 11] 24. Petitioners show that the fishing and shrimping season opened in the coastal waters off the State of South Carolina July 1, 1947 and continues until September 1st, 1947 and as a result of said illegal interference with the rights of petitioners to fish and shrimp in said waters, said boats are idle, and unless immediate relief is afforded by restraining said illegal interference, said season will have

ended and petitioners will have suffered irretrievable and irraparable loss and injury.

Wherefore waiving discovery petitioners pray:

(a) That the Statutes set out in said petition be decreed to be unconstitutional and illegal and in contravention of the constitutional rights of said petitioners in said petition.

(b) That said Court issue a temporary restraining order, restraining said defendants from proceeding further in the enforcement of said Statutes of the State of South Carolina as set out in said petition until a three-Judge Court can convene and determine the grant or refusal of an interlocutory injunction.

(c) That a rule nisi issue directed to said defendants, giving them five (5) days notice of said application for an interlocutory injunction and that said defendants be cited to appear before a three-Judge Court to be designated by said District Court, and to show cause at said time why an interlocutory injunction as prayed for should not be granted.

(d) That an interlocutory injunction be granted as prayed, restraining and enjoining the enforcement of the Statutes of South Carolina as set out in said petition on the grounds that the same are illegal and unconstitutional and in contravention of Plaintiffs' rights in the premises.

(e) That a permanent injunction be granted to your petitioners by *siad* three-Judge Court to be convened by said District Court and that said Statutes as set out in said petition be decreed to be unconstitutional and illegal for the grounds set out in said petition.

(f) That subpoena or summons issue directed to said de-
[fol. 12] fendants requiring them to be and appear at the next term of the U. S. District Court for the Eastern District of South Carolina, Charleston Divistion, to answer petitioners upon the merits of their comp-aint.

(S.) Aaron Kravitch, Robert E. Falligant, Attorneys for Petitioners; Thos. P. Bussey, Attorney of Counsel for Petitioners, 11 Broad Street, Charleston, 3 S. C.

P. O. Address, Savannah, Georgia.

[fols. 13-15] *Duly sworn to by Joseph De Gracia, et al. Jurats omitted in printing.*

[fol. 16] EXHIBIT "A" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3304. The state board of fisheries. To carry out the purposes of Sections 3299 thru 3412 there is hereby created the state board of fisheries which body shall consist of three persons having expert knowledge of coastal fisheries and related subjects and not engaged in the same for profit nor interested in any firm or corporation so engaged. They shall be separately appointed and commissioned by the Governor for the term of three years each, except for the first appointees thereunder, one of whom to be designated as the chairman, shall be appointed for three years, one for two years and one for one year, and shall be a body corporate, which appointees shall consist of the present board of fisheries of South Carolina, until their several terms of office expire."

[fol. 17] EXHIBIT "B" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3301. Jurisdiction of state board of fisheries.—The state board of fisheries shall have and retain jurisdiction over all salt water fish, fishing and fisheries, and all fishing, fish and fisheries in all tidal waters of the State and all fish, fishing and fisheries in all waters of the State whereupon a tax or license is levied for reason of commercial purposes. This includes the following: all shellfish, crustaceans, diamond back, terrapin, sea turtles, porpoises, shad, sturgeon, rock, herring, and all other migratory fish."

[fol. 18] EXHIBIT "C" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3308. Board to enforce laws. It shall be the duty of the board of fisheries to impartially enforce all laws pertaining to fish and fisheries."

[fol. 19] EXHIBIT "D" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3310. Board to make rules, etc.—penalties for violation.—The board shall have authority to adopt and promulgate rules and regulations for the government of the force under their control and for the control of fisheries, not contrary to or inconsistent with the laws and policy of the State, having the force and effect of law and to provide penalties for violation thereof not to exceed forfeiture of license or privilege previously granted by said board."

[fol. 20] EXHIBIT "E" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 2038. Jurisdiction of the State of South Carolina. The sovereignty and jurisdiction of this State extends to all places within its bounds, which are hereby declared to be as follows:

The northern line beginning at a point on the seashore about a mile and a quarter east of the mouth of Little River, runs in a northwest direction sixty-four and one half miles, to a point two miles northwest of one of the branches of Little Pee Dee River; thence, in the same direction, twenty-two miles, to a stake in a meadow, thence, in a direction due west, a distance of sixty-two miles, to a point where the said line intersects the Charleston Road (at sixty-one miles) near the Waxhaw Creek; thence north two degrees, twelve and one-half minutes, east eight miles to a gum tree on the southeastern corner of the Catawba Indian Reservation as laid out in 1764; thence following the eastern and northern boundary lines of the said Catawba Indian Reservation to where the said northern boundary line crosses the thread of the Catawba River; thence up the thread of the said river to the confluence of the north and south forks thereof; thence west to a stone on Tryon Mountain marked "S. C.

and N. C., September 15th, 1815," thence from a stone set up and marked "S. C. and N. C., September 15th, 1815," running west four miles and ninety poles to a stone marked "S. C. and N. C.;" thence south twenty-five degrees west, one hundred and eighteen poles to a chestnut tree on top of a ridge dividing the waters of the north fork of Pacolet River from the waters of the north fork of the Saluda River; thence along the various courses of the said ridge (agreeably to the plat and survey of the commissioners and surveyors accompanying their report, dated 2nd November, 1915,) to the ridge that divides the Saluda waters from those of Green River: thence along the various courses of the said ridge, agreeably to the said plat and survey, to a stone set up where the said ridge joins the ridge which divides [fol. 21] the eastern and western waters, and which stone is marked "S. C. and N. C., September 28th, A. D. 1815;" thence along the various courses of the said ridge, agreeably to the said plat and survey, to a stone set up on that part of it which is intersected by the Cherokee boundary line, run in the year 1797, and which stone is marked "S. C. and N. C., 1813;" and from the said last mentioned stone, on the top of the said ridge, at the point of intersection aforesaid, a direct line south, sixty-eighth and one-fourth degrees west, twenty miles and eleven poles, to the thirty-fifth degree of north latitude, at the rock in the east bank of the Chattooga River, marked "Latitude thirty-five degrees, A. D. 1813;" which line from the termination of the line of 1772 to the Chattooga River, is, in all, a distance of twenty-four miles and one hundred and eighty-nine poles.

From the State of Georgia, South Carolina is divided by the Savannah River, from its entrance into the ocean to the confluence of the Tugaloo and Seneca Rivers; thence up the Tugaloo River to the confluence of the Tallulah and the Chattooga Rivers; thence up the Chattooga River to the 35th parallel of north latitude, which is the boundary of North Carolina; the line being midway between the banks of the said respective rivers when the water is at ordinary stage; and where the rivers are broken by islands of natural formation, which, under the treaty of Beaufort, are reserved to the State of Georgia, the line is midway between the island banks and the South Carolina banks when the water is at ordinary stage.

On the east the State is bounded by the Atlantic Ocean, from the mouth of the Savannah River to the northern boundary, near the mouth of Little River, including all islands.

[fol.22] EXHIBIT "F" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3300. Jurisdiction.—The waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low water mark on the coast thereof, not heretofore conveyed by grant from the Legislature or lawful compact with the State, shall continue and remain as a common for the people of the State for the taking of fish, subject to the provisions of Sections 3299 thru 3412 and any future act that may be passed; provided, the privisions of Sections 3299 thru 3412 shall not apply to fish or fishing in the fresh waters of this State."

[fol. 23] EXHIBIT "G" TO PETITION

Title

To amend Section 3379, Code of Laws of South Carolina, 1942, so as to provide for the licensing of out-of-state shrimp boats and shrimp boats owned by residents of this state, and to limit the number of non-resident licenses to be issued annually, to provide for preferences in issuing such licenses, to provide that the payment of income taxes of the owner of the boat shall be a prerequisite of the issuing of such licenses, and to provide penalties for the violation of the provisions thereof.

Section 1. That Section 3379, Code of Laws of South Carolina, 1942 be and the same is hereby, amended by inserting after the words "South Carolina" on line 3 thereof the following: "and the below listed licenses are hereby levied annually upon shrimp boats owned by non-residents of this State and shrimp boats owned by residents of this State"; and by adding at the end of said Section the following: "All

owners of shrimp boats who are residents of the State of South Carolina, shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) Dollars per year, and all owners of shrimp boats who are non-resident of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One Hundred and fifty ($150.00) Dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years shall take out a license for each boat owned by him and said license shall be Two Thousand five hundred (2,500.00) Dollars per year", so that said Section when so amended shall read as follows:

"Section 3379. The following license tax is hereby levied annually upon the different fishing appliances except sturgeon nets, used in the waters of South Carolina and the below listed licenses are hereby levied annually upon shrimp boats owned by non-residents of this State and shrimp boats [fol. 24] owned by residents of this State: Anchor gill nets, stake gill nets, and drift gill nets, twenty-five (25) cents for each one hundred (100) yards or fraction thereof. Trap nets, floating, one dollar and fifty ($1.50) cents each. Submerged trap nets, three ($3.00) dollars each. Shrimp trawl nets, five ($5.00) dollars each. For any apparatus used and not above unumerated, other than cast nets and hook and line, the license shall be the same as that provided for the apparatus or appliance which it most resembles. All owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One Hundred and Fifty ($150.00) Dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years, shall take out a license for each boat owned by him and said license shall be Two thousand five hundred ($2,500.00) dollars per year."

Section 2. That the State Board of Fisheries shall not

grant non-resident licenses to operators of shrimp boats on and after July 1, 1947, in excess of one hundred (100) per year. That in granting licenses to non-resident shrimp boats, the State Board of Fisheries is to give preference to issuance of licenses to those non-resident boats that have been fishing in South Carolina for the longest number of year-; Provide-, however, that applications for license by such boats, or the operators of such boats be made on or before June 1st of the respective year. If, by June 1st of a respective years, the Board of Fisheries has not granted one hundred (100) licenses to the operators of non-resident shrimp boats which have operated in South Carolina for the longest number of years, then the Board of Fisheries may grant such licenses to any applicants therefor until the number of one hundred (100) licenses have been issued.

[fol. 25] Section 3. The Board of Fisheries, before issuing any non-resident license in the year 1948 and thereafter, shall require proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year.

Section 4. It is mandatory upon the State Board of Fisheries to revoke immediately, and have its designated Inspector take up, any license issued to a resident or non-resident operator of a shrimp boat upon conviction of any violation of any of the fishing laws, to-wit: First offense, ten days; second offense, thirty days; third offense, one year.

Section 5. All fines and forfeitures for the violation of any of the Coastal Fisheries Laws shall be paid to the Treasurer of the County in which the violation occurs, if, and only if, the case of violation of said Fisheries Laws is brought by an officer of the State or County other than an inspector for the Board of Fisheries. Provided, that no license shall be granted to residents of a state if under the laws of that state licenses to trawl for shrimp in that state at the same or less license fee are not granted to South Carolinians applying therefor."

Section 6. All acts or parts of Acts inconsistent herewith are hereby repealed.

Section 7. This act shall take effect upon its approval by the Governor.

[fol. 26] EXHIBIT "H" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3414. Licensed shrimp trawlers unload and pack and stamp shrimp before shipping or transporting shrimp out of State—All boats licensed by this State to trawl for shrimp in the waters of the State of South Carolina shall land or dock at some point in South Carolina, and shall unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another State or the waters thereof. Any person, firm or corporation violating the provisions of this section shall upon conviction thereof be fined not exceeding five hundred ($500.00) Dollars or imprisoned not exceeding one year, or both in the discretion of the court.

This section shall be a part of the coastal fisheries law, and any equipment or property used in the violation of any of the provisions of this section shall be confiscated, as provided for in Section 3404, 1932 Code."

[fol. 27] EXHIBIT "I" TO PETITION

Civil Code of South Carolina of 1942

Volume II

"Section 3328. Authority of inspectors.—It shall be lawful for the inspectors to enter any and all premises, vessels, boats, houses, sheds or warehouses used in fishing or any fishing industry in the tide waters or coastal section of this State and to arrest, without warrant, all persons found actually violating the penal laws, contained in the coastal fisheries law."

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Civil 1804

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. Davies, S. D. Collins, and The Atlantic Seafood Producers, Inc., a corporation, Petitioners,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG, and J. A. Wilcox, composing the South Carolina State Board of Fisheries, a body corporate and Alonzo B. Seabrook, the Chief Inspector thereof, Defendants

ORDER TO SHOW CAUSE, ETC.—Filed August 6, 1947

The above cause coming on to be heard upon the motion of the Plaintiffs set out in the above entitled motion for an interlocutory injunction against the defendants named in the annexed petition on the verified complaint and on the affidavits of George G. Dodge, President of the Atlantic Seafood Producers, Inc., Earl J. Toomer, Joseph DeGracia, S. W. Davies and S. D. Collins, a majority of the Plaintiffs, verified on the 30th day of July, 1947, and it appearing to this Court that the complaint herein seeks an interlocutory injunction restraining the enforcement of the Statutes of South Carolina set out in said petition by restraining the State Board of Fisheries, its members, agents and employees, and the Chief Inspector, in the enforcement of such Statutes on the grounds of unconstitutionality of said Statutes as provided by Section 266 of the Judicial Code, it is ordered, adjudged and decreed as follows:

1. The Hon. C. C. Wyche of the above Court, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this cause, the Hon. John J. Parker, Judge of the Circuit Court of Appeals for the Fourth Circuit, and the Hon. George Bell Timmerman, Judge of the District Court of the United States for the Eastern and Western Districts of South Carolina.

2. It is further ordered, adjudged and decreed that said [fol. 29] defendants appear and show cause, if any they have, on the 25th day of August, 1947, at Spartanburg, S. C., at ten o'clock a.m., why an interlocutory injunction

should not issue as complained for in
joining said defendants from the
Statutes of South Carolina as set out i

3. It is furth ordered that said de
required after five (5) days notice by s
petition, order and subpoena, to be an
in the United States District Court a
Carolina, on the 18th day of August, 1
A.M., and show cause, if any they hav
restraining order should not issue, as
petition.

This 5th day of August, 1947.

(S.) C. C. Wyche, United Sta

[fol. 30] [File endorsement omit

IN UNITED STATES DISTRICT

[Title omitted]

AMENDMENT TO PETITION—Filed A

Now come the Plaintiffs in the abov
matter and by leave of the Court first
amend the petition heretofore filed in th
lars, to-wit:

1. By adding after Paragraph One
paragraph designated as follows:

"1a. That the Atlantic Seafood Prod
profit organization composed of comme
are citizens of the United States domici
Georgia, Florida, South Carolina an
operating fleets of fishing vessels and
the open seas off the coastline of said S
ation being organized for the mutual
welfare of its members and is engage
study for the improvement of ocean fis
of its members."

2. By adding after Paragraph Four
paragraph designated as follows:

"4a. That the trawling for shrimp, p
of the territorial waters, consisting of
rivers, inland streams and estuaries in

Carolina is expressly prohibited at all times by Statute as set forth in the 1942 Civil Code of South Carolina, Volume 2, Section 3410 thereof. A copy of said Section being hereto attached and made a part hereof marked Exhibit "J." That Sections of said 1942 Code from 3300 through 3414 [fol. 31] herein set forth and complained of are all Statutes enacted by the State of South Carolina solely for the control, including the licensing and taxing, of all fish, fishing and fisheries in the open seas within three (3) miles along the low water mark of the coast of said State."

3. By adding after paragraph Six (6) the following paragraph designated as follows;

"6a. Petitioners show that their fishing trawlers are all vessels of less than twenty (20) tons burden net and as such are duly enrolled and licensed in conformity to Title 50 "Regulation of fishing and domestic commerce" of the revised statutes of the United States, to engage in coasting trade and mackerel fishery for the purpose of taking of fish of every description in the coastal waters of the United States, and the States are thereof without legal authority to impose a license, tax, or regulations for operating off the high seas along the shores of the various States, including the State of South Carolina."

4. By adding after Paragraph Ten (10) the following paragraph designated as follows:

"10a. Petitioners further show that the aforesaid Sections 3379 as amended and Section 3414 of the Civil Code of the State of South Carolina hereinabove referred to requiring that all boats operating within three (3) miles of the low water mark of the coast thereof shall be licensed by said state for the purpose of trawling for shrimp and fish and shall land or dock at some point in South Carolina and unload their catch of shrimp and fish and pack and properly affix tax stamps thereon in accordance with impost tax imposed by Section 3374 of the 1942 Civil Code of South Carolina, Volume 2 (hereto attached and made a part hereof [fol. 32] marked Exhibit "K") before shipping or transporting said shrimp or fish to another state or the waters thereof, are unconstitutional in that the same seeks to compel petitioners to import fish and shrimp into the State of South Carolina so that said State may levy an import duty

or tax thereon in violation of Article 1, Section 10, Clause 2 of the Constitution of the United States.

5. By adding paragraph 25 to read as follows:

"25. That the classifications adopted in the act of 1947 known as an act to amend Section 3379 of the Code of laws of South Carolina, set out in said petition as Exhibit "G" and the various sections thereof, are not reasonably related to or supported by the alleged legislative purposes of said act, and are therefore violative of the equal protection clause of Amendment Fourteen of the United States Constitution. The sections that are specifically objectionable are Section One (1) which arbitrarily fixed different licenses without regard to the size or nature of the vessel or the catch hauled in, and basing the same entirely on the residence of the owners of said vessels; and Section Two (2) which undertakes to limit the number of licenses which may be issued to operators of non-resident shrimp boats in an amount not to exceed one hundred (100) and also being limited to those boats which have operated for the longest number of years in the waters off South Carolina, while the number of licenses that can be issued to South Carolina residents are unlimited; and Section Three (3) of said act which has a condition precedent to the issuance of licenses to non-residents requires that they must first furnish proof that they had paid all income taxes due the state of South Carolina for profits made from operations in South Carolina during the preceding year without at the same time, requiring a similar provision of residents of South Carolina. That said Sections show the general [fol. 33] scheme of said statute to be one designed to discriminate against and to render impossible fishing and shrimping by non-residents, and to seek to sustain its legality under the cloak or guise that the statute is a conservation measure.

Thomas P. Bussey, Robert E. Falligant, Phyllis Kravitch, Aaron Kravitch, 11 Broad Street, Charleston 3, S. C.

Amendment allowed subject to objection. This — day of ——, 1947.

(S.) C. C. Wyche, Judge, United States Court.

[fol. 34] EXHIBIT "J" TO AMENDMENT

Civil Code of South Carolina of 1942

Volume II

"Section 3410. Trawling for shrimp prohibited.—The trawling for shrimp in any stream, bay, sound or river within this State is hereby prohibited.

Any person, firm or corporation violating the terms of this section, upon conviction, shall be fined not more than one hundred ($100.00) dollars or imprisoned not more than thirty days."

[fol. 35] EXHIBIT "K" TO AMENDMENT

Civil Code of South Carolina of 1942

Volume II

"Section 3374. Scale of fisheries' tax.—The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit: on each sixty ounces of canned oysters two cents; on every gallon of shucked oysters five cents; on every bushel of clams in the shell ten cents; on each bushel of oysters in the shell ten cents; on each terrapin (during the open season) five cents; on soft crabs, two cents per dozen; hard crabs, ten cents per bushel; on crab meat, two cents per gallon; shrimp, when cooked, one cent for each sixty ounces or fraction thereof; on each pound of green shrimp, one-eighth of one cent. Provided, that and impose tax of five (5) cents shall be put upon each white shad and two (2) cents upon each hickory shad offered for sale, or shipped from any point in the state to any point within or without the state; Provided, that the license tax on raw oysters shall be five cents per gallon whether sold to local consumers or otherwise, and where said oysters are sold in less than gallon lots, a tax stamp shall be affixed at the rate of five cents per gallon. Provided, that a like tax on all shad imported into this State shall be subject to the same tax as herein provided before the same may be offered for sale. Provided, Further, that there is hereby imposed a tax of two (2¢) cents on each sixty ounces of canned clams and five (5¢) cents per gallon on raw shucked clams."

[fol. 36] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

RETURN TO RULE TO SHOW CAUSE ON TEMPORARY RESTRAINING ORDER—Filed August 18, 1947

The defendants herein by way of return to the rule to show cause of this Honorable Court dated 5 August 1947 as to why a temporary restraining order should not issue as prayed for in the petition herein, would respectfully show to the Court:

1. That the defendants admit their official capacities as alleged in the petition we well as the other formal allegations of the petition and admit that for the purpose of this hearing upon plaintiffs' application for a temporary restraining order this Court has jurisdiction of the cause.

2. That plaintiffs have made no showing of any clear and imminent irreparable injury to them through the enforcement of the State Laws alleged to be unconstitutional which would justify a Federal Court of Equity in issuing a tem-
[fol. 37] porary restraining order against enforcement of such State laws.

3. That the petition shows upon its face that the acts of the defendants complained of are proper and that the State laws under which they are proceeding are not in violation of any prohibition of the Federal Constitution.

Wherefore the defendants ask that the temporary restraining order sought herein be refused.

(S.) John M. Daniel, Attorney General for South Carolina; T. C. Callison, Assistant Attorney General; J. Monroe Fulmer, Assistant Attorney General, Attorneys for Defendants.

(S.) Robinson & Robinson, of Counsel.
August 18th, 1947.

[fol. 38] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

—Filed Aug. 18, 1947

This matter is before us upon rule to show cause why a temporary restraining order as prayed for in said petition should not issue.

The decision of this question practically amounts to a decision of the issues involved in the hearing before a three-Judge Court to be held one week from today. For this reason we deem it advisable to deny the motion for a temporary restraining order and it is so ordered.

C. C. Wyche, United States District Judge; George Bell Timmerman, United States District Judge.

Columbia, S. C.
August 18, 1947.

[fol. 39] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

RETURN AND ANSWER—Filed August 25, 1947

By way of Return and Answer the defendants would respectfully show to this Court:

1. They do not have accurate information as to the residence of the plaintiffs. The named defendants are all citizens of South Carolina.

2. On information and belief the defendants deny that the amount in controversy exceeds Three Thousand ($3000.00) Dollars. They admit that the petition questions the constitutionality of certain laws of South Carolina.

3. They admit that South Carolina has passed legislation creating the State Board of Fisheries and defining its functions. They ask reference to the statute law for the

[fol. 40] terms of this legislation. Code 1942, 3299-3421, as amended.

4. They admit that the defendants are the members of the State Board of Fisheries and its Chief Inspector and that these defendants reside in this District. They ask reference to Sections 3300-3414 for their terms.

5. In answer to paragraph five these defendants ask reference to the statutes (Code 2036, 3300) for their terms.

6. They admit, on information and belief, that the individual plaintiffs are engaged in commercial fishing off the South Atlantic coast. They aver, on information and belief, that the corporate plaintiff, The Atlantic Seafood Producers, Inc. is an association of persons engaged in commercial fishing, and not itself engaged in fishing. These defendants have no information sufficient to form a belief as to whether the plaintiffs pay taxes and have licenses from Georgia or Florida. They have no information sufficient to form a belief as to the value of the property belonging to the plaintiffs, as to the volume of their business, but aver that the records of the South Carolina Tax Commission show that none of the plaintiffs paid any South Carolina income or corporation license tax for the year 1946, despite the fact that the plaintiff Cesaroni reported that he had taken more than 43,000 pounds of fresh headless shrimp during the 1946 season. These defendants do not have sufficient information to form a belief as to the size of or whether the plaintiffs' boats are registered under Federal law.

[fol. 41] 7. On information and belief, they admit that the individual plaintiffs have been engaged in commercial fishing along the Atlantic seaboard for a number of years. They deny that the defendants have infringed on any constitutional right of any plaintiff.

8. In answer to the allegations of paragraph eight these defendants aver that the Court records of Beaufort County, S. C., show the following criminal records of the several plaintiffs:

Joseph DeGracia:

(a) Plead guilty i' the General Sessions Court for Beaufort County for nshing on May 14, 1947 out of season in violation of Section 3408, was fined $300.00 ($200.00 suspended)

(b) Plead guilty to a similar violation on June 3, 1947 and received the same sentence.

Samuel D. Collins:

Plead guilty in Beaufort General Sessions Court of violating Section 3408 on June 3, 1947 and sentenced to pay $300.00 ($200.00 suspended).

S. W. Davies:

Plead guilty of violating Section 3408 on June 3, 1947 and sentenced to pay $300.00 ($200.00 suspended).

J. A. Cesaroni:

(a) Bench warrant outstanding for fishing out of season on June 3, 1947 in violation of Section 3408;
(b) Convicted of violating Sections 3408, 3410 on April 18, 1940;
(c) Convicted of violating S. C. Fishery laws October 22, 1943, fined $100.00;
(d) Convicted of violating S. C. Fishery laws August 21, 1945, filed $100.00;
(e) Convicted of violating S. C. Fishery laws August 28, 1945, filed $100.00;
(f) Convicted of violating S. C. Fishery laws August 28, 1945, fined $100.00.

E. J. Toomer:

(a) Charged with violating Section 3408 on Nov. 14, 1938 and forfeited appearance bond;
(b) Convicted of violation of S. C. Fishery law on Aug. 28, 1945 and fined $100.00.

[fol. 42] On information and belief the defendants would further show that warrants have been issued for certain of the plaintiffs as set out herein but that these plaintiffs have to date avoided the service of these warrants:

Samuel D. Collins (Boat "Pearl of the Sea"), Violating Section 3379 on July 8, 1947 (2nd offense);

Samuel W. Davies (Boat "Novelty"), Violating Section 3379 on July 8, 1947 (2nd offense);

Jose DeGracia (Boat "17A614"), Violating Section 3379 July 8, 1947 (2nd offense);

E. J. Toomer (Boat "Ramp"), Violating Sections 3410 and 3414 on July 8, 1947;

E. J. Toomer (Boat "Thunderbolt"), Violating Section 3414 on July 8, 1947;

E. J. Toomer (Boat "Savannah"), Violating Section 3414 on July 8, 1947;

E. J. Toomer (Boat "Mary T"), Violating Section 3414 on July 8, 1947.

9. These defendants ask reference to Section 3379, as amended, for its terms. They allege that this statute is a valid conservation measure authorized by the police powers of the State.

10. On information, advice and belief, these defendants aver that Section 3379, as amended, and Sections 3414, 3374 and 3328 are valid and constitutional.

11. On information, advice and belief, these defendants aver that there is no such common interest as would entitle the plaintiffs to join their several complaints in this single suit.

12. On information, advice and belief, that the warrants referred to in paragraph 12 are those referred to hereinabove in paragraph 8, though there seems to be a slight [fol. 43] difference in dates. That while these warrants have been issued the plaintiffs have avoided service, though by submitting to trial they could raise in the General Sessions Court the constitutional questions alleged here.

13. These defendants aver that under their duty to impartially enforce the laws they cannot sit idly by and watch the plaintiffs violate Sections 3379, 3408, 3410 and 3414, and if they found the plaintiffs violating these laws they would ask for warrants for their arrest but they deny that they have made any threats. These defendants specificially deny that they have threatened to seize or confiscate any boat or equipment of the plaintiff because it is the opinion of these defendants that the power to seize such property once given by Section 3414 was repealed by the Act of 1940, page 1695, which repealed Sections 3403 and 3404 of the 1932 Code. Therefore these defendants have not seized nor threatened to seize any of the plaintiffs' property. These defendants have no inofrmation sufficient to from a belief as to the financial affairs of the plaintiffs.

On information and belief, that E. J. Toomer, one of the plaintiffs has formed a South Carolina corporation, the "Port Royal Seafood Co.", of which he is President and has continued his fishing operations in that name.

14. On information, advice and belief, these defendants deny that these State laws violate any provision of the Federal Constitution as alleged in paragraphs 14-19, 25 of the complaint, and on the contrary aver that they are valid conservation and inspection measures, setting up reasonable classifications and not in conflict with any provision of Federal law.

[fol. 44] 15. In answer to the allegations of paragraph 20 these defendants aver that the plaintiffs may test the validity of the South Carolina law in the criminal proceedings now pending or they may question these same provisions in the civil courts of South Carolina.

16. On information and belief, the fishing laws of South Carolina were passed as conservation measures and that the revenue features of these laws are for the purpose of providing inspection funds and in fact have not produced sufficient revenues for that purpose.

17. In answer to the allegations of paragraphs 22, 23, 24 and 25 of the complaint these defendants aver that there is no equity in the bill, in that there is available an adequate remedy at law; in that no irreparable damage within the meaning of that term as used in equity has been alleged or suffered by the plaintiffs; in that the plaintiffs as habitual violators of the fisheries laws and as persons who are evading the service of criminal warrants have no standing in equity; and because the South Carolina laws questioned here are valid enactments of the General Assembly of South Carolina.

Wherefore the defendants ask that the injunction be denied and the bill dismissed.

(S.) John M. Daniel, Attorney General; T. C. Callison, Asst. Attorney General; J. Monroe Fulmer, Asst. Attorney General, Counsel for Defendants.

(S.) Robinson & Robinson, of Counsel.
August 25, 1947.

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS AND TESTIMONY—Filed October 20, 1947

It is agreed and stipulated between the parties through their counsel of record that:

1. The cause in question was submitted to the three-Judge Federal Court composed of Hon. John J. Parker, U. S. Circuit Judge; Hon. C. C. Wyche, U. S. District Judge; and Hon. George Bell Timmerman, U. S. District Judge, for final decision and decree.

2. It is admitted and agreed that the appellees were not threatening the confiscation of appellants' boats for the violation of the fishery laws attacked and have not confiscated any boats for violation of these Sections since 1940, and that the Statute in reference to confication has been repealed by subsequent Statutes.

3. It is stipulated and agreed that the appellants' violations of the Fishery Laws alleged in appellees' return and answer are correct.

4. It is stipulated and agreed that none of the plaintiffs, now appellants, have paid any income taxes to the State of South Carolina.

5. It is stipulated and agreed that the corporate plaintiff, now one of the appellants, is not domesticated in the State of South Carolina.

6. It is stipulated and agreed that the plaintiff, Toomer, now one of the appellants, had transferred ten (10) of his twelve (12) fishing boats to a South Carolina corporation of which he is president.

[fol. 46] 7. It is stipulated and agreed between the parties that while there are warrants that have been forwarded to the Sheriff of Chatham County, Georgia, for the arrest of certain of the appellants for violating alleged fishing statutes of South Carolina, and the said appellants have knowledge of the warrants, under an agreement with the Sheriff they are not being required to submit themselves to arrest or to give bond and to be removed to South Carolina for trial until the validity of certain Statutes can be established.

8. It is stipulated and admitted that the license that South Carolina demands of the appellants is Twenty-five Hundred ($2500.00) Dollars.

9. It is stipulated and admitted that Earl J. Toomer, one of the appellants, has two fishing boats which were used off the coastal waters of South Carolina, and that Joseph A. Cesaroni has eight boats.

10. It is stipulated and admitted that the South Carolina Fishing Commission issued more fishing licenses the year of 1947 than it did in the year 1946. In the year 1946 two hundred fifty-four (254) licenses were issued, of which one hundred fifty-four (154) were for South Carolina residents and one hundred (100) for out of state residents. In the year 1947 two hundred seventy-one (271) had been issued, of which all but fifteen (15) were to South Carolina residents.

11. It is stipulated and agreed that pages one to twelve of the stenographer's transcript dealing with colloquy between the Court and counsel be omitted in the printed record.

12. It is stipulated and agreed that the shrimp fishing season in South Carolina is for a period of eight (8) months, the months of March, April, May and June being closed seasons.

13. It is stipulated and agreed that under the Statutes of South Carolina there is no provision by which a license [fol. 47] or tax can be paid under protest and for which recovery can subsequently be had in the event the Statutes under which said license or tax was paid were subsequently held to be invalid or unconstitutional.

14. It is stipulated and agreed that the boats in question belonging to the appellants comply with the Federal inspection laws and are all licensed by the Federal Government.

15. It is stipulated and agreed that all of the party plaintiff, now appellants, are non-residents of the State of South Carolina, while all of the party defendants, now appellees, are residents of the State of South Carolina, and that the amount involved is more than Three Thousand ($3,000.00) Dollars, and that there is a diversity of citizenship.

16. It is further stipulated and agreed that each of the appellants own one or more boats engaged in the shrimping business and that each of them to fish in the waters off the shores of South Carolina under the present license

tax would be required to pay a Twenty-five Hundred ($2500.00) Dollars' license for each boat, besides being required to bring their catch into a port of South Carolina for the purpose of being packed and for the purpose of paying the required tax on said shrimp as provided for in the Statutes in question and to pay an income tax on the profits made therefrom.

17. It is stipulated and agreed that the stipulations entered into herein, together with the narrative form of the testimony given by the witnesses as condensed from the stenographer's transcript; is to be printed as the evidence in said case and the printing of the stenographer's transcript as part of the printed record is dispensed with.

18. It is further stipulated and agreed that entries of [fol. 48] filing and service are dispensed with, both sides agreeing that all pleadings and all testimony being printed have been regularly filed and that service has been made of all necessary documents as required by law.

19. It is further stipulated and agreed that the testimony of the witnesses was as follows:

S. W. DAVIES, being sworn, testified as follows:

Direct examination by Mr. Falligant:

Witness: "I am a resident of Savannah, Georgia. My name is S. W. Davies. I am one of the plaintiffs in this case. I own one individual vessel and have eight fishing for me. My vessels are tied up as a result of my inability to fish in South Carolina waters. They are tied up at the Savannah Bridge. I am being compelled to maintain part of my crew on my vessels and am being compelled to pay them for that purpose. I won't be able to use these vessels for any other purpose until the last of September when I will use them in Georgia. It isn't profitable to use them in Georgia waters at this time because you don't catch any shrimp. The shrimp follow the season and they work their way down the coast and that is the reason I am not fishing in Georgia waters at this time."

Cross-examination by Mr. Robinson:

Witness: "The name of my boat is the 'NORADY'. It has been tied up now for about three weeks. When we brought this suit it wasn't tied up because we were fishing then in South Carolina waters."

Question by Judge Parker:

Witness: "I have one boat but I have eight individual boats fishing out at my place. All the boats are tied up now for the lack of shrimp in Georgia. The shrimp run on the coast from one state to the other and we follow them up and down the coast."

Questions by Judge Timmerman:

Witness: "My fishing is exclusively for shrimp. None of the other fishermen who are plaintiffs fish for anything other than shrimp as the boats are only rigged out to fish for shrimp."

[fol. 49] *Questions by Judge Parker:*

Witness: "We fish outside in the ocean. At times we are out five or six miles and at times we are right against the shore, according to where we locate the shrimp at. We do not fish in inland waters, but we do fish within the three-mile limit."

Questions by Judge Timmerman:

Witness: "Our fishing season has stopped here. It starts in September and we catch a few shrimp anywhere, but mostly now thay are in Carolina waters. When we are not fishing in Carolina waters we fish in Florida and Georgia. We do not fish in North Carolina or Virginia, nothing but Georgia, Florida and Carolina."

Question by Judge Wyche:

Witness: "In South Carolina."

Question by Mr. Robinson:

Witness: "I plead guilty this year to fishing out of season for my boats but I was not on my boat. My boat did. They had issued a warrant for me, individual, and the lawyer told me we had a case over there and we all went over and all of us plead guilty to the boats. We have captains on the boats and the warrant was issued for me."

Question by Judge Timmerman:

Witness: "I did not send the boats out. The fishermen take that on their ownselves, where to fish at."

Redirect examinatio

Witness: "This fishing
of South Carolina in the
statutes we are attacking
guilty to fishing the open
lina."

Question by Judge

Witness: "We did not
in that proceeding."

Question by Mr. Kra

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Question by Judge

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Direct examination

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Question by Mr. Fa

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Question by Judge

Witness: "It is a corpo

Question by Mr. Falligant:

Witness: "As a result of these fishing laws which have been enacted and amended in South Carolina, my boats are not fishing in Carolina at the present time. My boats are fishing but very little. There isn't anything for them to catch and most of my boats are tied up. I keep one boat fishing just to see when the shrimp will show up. We send a boat out to try the shrimping. If there is anything there we all go out. In other words, we keep a trial balloon out there. I have not been convicted of any of these offenses. As to whether or not we keep a skeleton crew on the boats while they are tied up, we have to keep the whole crew, as a matter of fact. We have to feed them, and they are always around the dock and it is $10.00 here and $5.00 there. In other words, we have to support them whether [fol. 51] they are working or not. I would estimate that 95 or 98 per cent of the shrimp that are caught enter interstate commerce and most of the shrimp are shipped to New York, Baltimore, Philadelphia and Washington. I did have some facilities in South Carolina for packing and icing shrimp and docking my boats but I have sold them and I do not have any this year. I have four boats and have been engaged in the shrimping business for about fifteen years. I originally fished in North Carolina and I came from North Carolina before I moved to Georgia. The average yield of a boat in quantity of shrimp per week over the fishing season is about twenty boxes a week. I would say the fishing season off the coast of South Carolina runs from eleven to thirteen weeks, from the middle of August, or the first of August, until the end of September. The shrimp then move south. They begin their southward migration about just as soon as it begins to get cool. Since a boat will produce twenty boxes of shrimp a week and the period of fishing off the Carolina coast is an average of twelve weeks, it will give a production per vessel of about two hundred and forty or two hundred and fifty boxes during the South Carolina season with an average net profit per box under the present market conditions of six or eight dollars. On two hundred and forty-eight boxes I think my profit would be Twenty-one Hundred and Twenty ($2120.00) Dollars before the payment of South Carolina tax of Twenty-five Hundred ($2500.00) Dollars. Then if I paid the South Carolina tax of Twenty-

five Hundred ($2500.00) Dollars, the non-resident license, the boat earnings would be insufficient to pay the license because if I packed them in South Carolina I would have to pay a packing charge of Five ($5.00) Dollars a box, which would further reduce my profit. The loss would be so considerable on each boat as to make it prohibitive. From ninety to ninety-five per cent of my shrimp entered interstate commerce, which applies to South Carolina porducers more than Georgia because they don't have the knowledge that Georgia has. I know this of my own knowledge. I have never sold one box in South Carolina. I did operate a business there at one time."

[fol. 52] *Cross-examination by Mr. Robinson:*

Witness: "The Atlantic Seafood Producers, Inc. is not an association of fishermen. It is an association of fish dealers, but the corporation, the Atlantic Seafood Producers, doesn't operate any fishing boats itself. I have not been convicted in the South Carolina courts. I did pay a fine in Beaufort County on November 15, 1945 for unstamped shrimp for one of my negroes. I paid One Hundred ($100.00) Dollars, I think that is right, for two boats; One Hundred ($100.00) Dollars apiece. As a matter of fact, I gave the conservation officer there a check for Three Hundred ($300.00) Dollars to take to the attorney, who paid One Hundred ($100.00) Dollars per boat and One Hundred ($100.00) Dollars legal fee. The violation was for bringing shrimp from Carolina into Georgia and packing them. That was the stamp law. They were unstamped but they were not packed in South Carolina. Inasmuch as I am the president of the Association and a member of the Association, I am one of the plaintiffs in this case. Individually, for my own boats, I am not a plaintiff and I am not a partner now of a person who does have a South Carolina license this year."

Examination by Mr. Falligant:

Witness: "The two fines that I paid for my darkies operating on these boats were for shrimp caught in the marginal belt outside of South Carolina. The inside waters of North Carolina and South Carolina are closed. I paid the catch for my darkies catching the shrimp, and they brought them to Georgia. The fine which was levied against them, which I paid, was for failure to carry those shrimp

which were caught in the marginal belt in the sea into South Carolina and paying a tax on it before bringing it out."

Question by Judge Parker:

Witness: "The shrimp there were caught within the marginal waters of South Carolina."

Question by Judge Timmerman:

Witness: "I did not contest the validity of the act at that time as it was easier to pay a fine than to contest it."

[fol. 53] *Examination by Mr. Falligant:*

Witness: "I would not say that most of my boats this season of the year fish on the boundary line between Georgia and South Carolina. They are fishing farther north than that now. Although most of the time it is on the marginal line. When the shrimp move a little further south on the marginal line, the Savannah River is the dividing line. We drag the shrimp nets up and down the coast, frequently fishing off of two states in one day. We frequently fish outside the three-mile limit and inside the three-mile limit in the same drag, in making a short drag, or dragging in toward shore and backing out. We attempt to follow a mud bottom. The mud bottom sometimes runs off shore in a straight line or sometimes it is parallel with the coast. We sometimes catch shrimp within the three-mile limit of South Carolina and of Georgia, and at the same time, also outside the three-mile limit if we make an off-shore drag starting at South Carolina or Georgia and going out. This was especially true a month ago when we were fishing in the channel at the mouth of the Savannah River. There is no way of determining the identity of the fish caught in South Carolina, Georgia, or outside the three mile limit."

Question by Mr. Kravitch:

Witness: "All these boats comply with the federal inspection laws and licenses."

20. It is further stipulated and agreed that Exhibits "A", "B" and "C" offered in evidence by the appellants shall be printed as part of the appellants' evidence in said case, and that Exhibits "D", "E", "F", "G" and "H" and "I"

offered on behalf of the appellees shall be printed as part of their evidence submitted in said case.

The 16 day of October, 1947.

Robert E. Falligant, Aaron Kravitch, Phyllis Kravitch, Attorneys for Appellants; John M. Daniel, Attorney General; T. C. Callison, Asst. Attorney General; J. Monroe Fulmer, Asst. Attorney General, Attorneys for Appellees.

Robinson & Robinson, of Counsel.

[fol. 54] EXHIBIT "A"

Thirty-Eighth Annual Report of the South Carolina State Board of Fisheries Year Ending June 30, 1944, to the Governor and General Assembly

SUBJECT NUMBER ELEVEN

SHRIMP

May I extend for myself and the State Board of Fisheries sincere best wishes to the men engaged in shrimping for a prosperous season which they so well deserve. People engaged in the shrimping business do not have an easy life. The Chairman of this Board has made trips on the trawlers on many occasions during all kinds of weather, and at times when the catch was good and again when the catch was poor, and well do I know what these men have to go through.

It seems now that shrimp is in great demand in the New England states. The brokers are exerting every effort to increase the number of accounts of reliable shrimpers for the reason that there has been a tremendous demand for more shrimp. I am looking forward to seeing in the near future some live-wire producer in the south begin producing shrimp on a big scale in one pound quick freeze cartons, shipped two dozen per case. I believe there is vast room for improvement in the merchandising of all seafoods. The evolution of selling is changing rapidly, and the fisheries are far behind. The modern house-wife does not want to buy sloppy looking fish in an old fashion market and then have to take the badly wrapped product and mess with a lot of bones.

The large self-service markets have changed everything. Almost everything is packed neatly, easy to pick up, attractive and usually ready to prepare and serve. If more producers would quickly freeze their products, everything from shrimp and oysters to clams for chowder in one pound packages with their own label, they could expect to build up [fol. 55] a large number of customers, good will, and a terrific demand. The day may come when the chain drug stores will have packages of quick frozen shrimp and other seafoods in their freezers for sale to their customers. If this condition comes to pass, it will certainly make the product most pleasing to the consumers and will place large quantities of shrimp and other seafoods before them at all times which should vastly increase their use.

There were 115 shrimp boats operating in South Carolina waters during this season which is a slight increase over the number of boats operating last season. These boats had to operate under many handicaps necessarily caused by war restrictions. There are twenty-two dealers who hold buyers and shippers licenses for shrimp, doing business in South Carolina.

At one time shrimp packing was one of the most important seafood canning industries of the Gulf of Mexico and the South Atlantic area of the U. S., but this industry has reduced its operations very materially recently for the reason, caused by abnormal conditions, of an enormous price and demand for shrimp which yielded more profit raw than if canned. The shrimpers have also suffered very materially from the scarcity of labor.

The shrimp boats operating in our waters are from many other states as we have a very small fleet of shrimp boats owned by South Carolinians. This industry employs a large number of people for heading, packing, catching and icing of shrimp. They purchase large supplies of groceries, spend considerable money for parts and repairs to boats. Therefore, the industry means quite a bit to our State.

We feel that there is an increase in the amount of shrimp in our waters this season, though there will not be as many caught as in normal times on account of restrictions and lack of labor. This condition has existed practically all over the Gulf coast and the Atlantic coast.

Cited by people of authority, an interesting side items concerning shrimp is the fact that it matures at two years of age as a male and during the next season it metamor-

phoses into a female, remaining as such for the rest of its life. These shrimp are caught on the regular grounds, often being brought up in large numbers in nets used to catch fish.

A large number of pounds were landed last year with little special effort to catch them.

[fol. 56] Because of the shortage of shrimp during the spring season, many shrimp canners turned to crab meat, canning that product for the first time, the coordinator's office reported. Of course, this statement applies to the South Atlantic area.

The current season's shrimp pack in the Gulf area to March 27th, was 8% below that for the same period one year earlier and 29% below the five-year average according to the services of New Orleans Fishery Market News office.

This season 39 canneries operating under the Seafood Inspection Service of the U. S. Food and Drug Administration have packed 558,461 standard cases utilizing approximately 37,452,000 lbs. of raw shrimp from July 1st, to March 27th. In the four-week period, February 28th, to March 27th, 1943, there were 1,441 standard cases packed, 18% below the 1,765 cases a similar period a year earlier.

[fol. 57] EXHIBIT "B"

Thirty-Ninth Annual Report of the State Board of Fisheries Year Ending June 30, 1945, to the Governor and General Assembly

SUBJECT NUMBER ONE

SHRIMP

O. C. F. has authorized construction of 2,128 fishing craft. All but 85 of which are expected to be completed before the end of this year. This will make productive capacity greater than at any time in our history. This signifies that the fishing industry should begin to spend more money in merchandising its products than ever before in its history, coupled with the utmost vigilance to market only products of quality. South Carolina is in dire need of having the proper facilities to ice fish, shellfish and cold storage

facilities for same, and other equipment such as proper docks etc. If these facilities were available, in our judgment, it would increase the volume of the fish industry many times.

The two greatest competitors of oyster-cocktail and half shell are the fruitcup and shrimp-cocktail. About one-fourth of the new fishing boats are shrimp trawlers. The addition of 500 new trawlers in the Atlantic area will greatly increase the efficiency of the shrimp fleet and increase its range. The shrimp business in our State is quite an industry, it employs numbers of men and boat crews spend large sums of money on repairs, gasoline, oil and food besides the money that is spent by the individuals personally. The number of shrimp trawlers operating in South Carolina waters for 1944-45 were 156 consisting of boats owned by citizens of South Carolina 77, and 79 owned by out of state people. A number of things may happen at first, production may be greatly increased. Unless the Supply can stand this added strain, and I doubt that it can for long, there will follow a declining catch per unit of effort to the point where many of these boats, particularly the older and less profitable, will enter other lines of fishing. Should the annual harvest decline appreciably, oysters may still hold the place of prominence on the menu without too great an effort on our part. Otherwise South [fol. 58] Carolina had better be ready for an intensive advertising and educational program relative to oysters.

Shrimp are generally recognized as being a highly perishable food. Unlike meats they are susceptible to a ripening process. It is, therefore, essential to keep them packed in ice or stored at temperatures low enough to prevent spoilage or to subject them to some form of preservation. With such a product speed, and distribution to consuming centers is a factor of importance. This is particularly true because of the fact that the great bulk of our catch is taken on the high seas or along our coast far distant from the inland market. These facts appear to be substantiated by reports of air shipments, such as shrimp from New Orleans to St. Louis and Chicago, and from Houston to Kansas City and Chicago. And the same thing would apply to shipments from Charleston to New York and other northern markets.

In the beginning, while cost of transportation and price are primary considerations, the hotels and restaurants promise to be the best outlets for airborne shrimp and other

seafood shipments. From other sources I have been informed that new, light weight, corrugated boxes, practically waterproof, have been perfected which may help to solve the problem. The tendency of consumers to *be* most of their buying of shrimp and other seafoods on the last three days of the week, and the uncertainty of the supply at the production points, gives the air services an advantage upon which it can readily capitalize. It is an old American custom to look for speed, more speed and still more speed. Considering the perishability of all seafoods, if the air transport service will attack the problem of providing satisfactory containers, reasonable rates and adequate pick up and delivery service, I believe they have a real opportunity for building a volume of shrimp and other seafood product shipments by air and should be in a position to render a real service in popularizing the use of seafoods by our people.

With an annual production of between four and five billion pounds of fishery products, you have a real opportunity to handle appreciable quantities of such products just as the [fol. 59] trucks make heavy inroads on the volume of fish formally carried by railroads. And don't forget the thousands of small hamlets that rarely get fresh seafoods and the largest cities at present inadequately supplied with these choice delicacies of the seas, and, especially, make certain that these packages bear labels to show that they were airborne quality foods. It looks as if this program will be put into effect, and if it is, it will revolutionize the seafood industry in our section as well as in the other parts of the country. It should increase the consumption of same in large quantities; it will also create a much greater demand for shrimp and seafoods all over the universe, and it will place them in sections where they are very seldom consumed with the result that many more people will get sold on the idea of eating same.

We are expecting an enormous increase in the volume of shrimp during the coming year as the war restrictions will be raised, and we are expecting labor to be plentiful. There will be an increase in the number of boats and the demand is large, and, we think, will take up our increase for the coming year.

Shrimp caught, in pounds, during the year of 1944-45 in the coastal waters of South Carolina amounted to 2,548,955. Shrimp headed, in pounds, amounted to 1,535,355.

The Atlantic States Marine Fisheries Commission, of which Senator J. D. Parler and Charles J. Geilfuss are members, and J. M. Witsell, Chairman of the State Board of Fisheries is Chairman and also on the Executive Committee, has been exerting every effort possible to have uniform laws passed by the adjoining states. And now that Florida has become a member of the Atlantic States Marine Fisheries Commission, we feel that it will soon be possible to have these laws perfected. North Carolina has not yet become a member of the above commission and we do not know what her attitude will be, but we believe that Georgia, Florida and South Carolina will soon pass laws that will be beneficial to all of the states adjoining each other, particularly, as to the shrimp industry.

This department has exerted every effort possible this season to protect the shrimp and enforce the shrimp laws, The shrimp season opens July 1st. During the months of April, May and June this department prosecuted 24 shrimpers for violating the law before season opened, 22 of which were convicted, 6 receiving fines of $5.00 each, 14 received fines of $100.00 with $75.00 suspended, 2 receiving fines of $25.00 each.

[fol. 60] EXHIBIT "C"

Fortieth Annual Report of the South Carolina State Board of Fisheries Year Ending June 30, 1946, to the Governor and General Assembly

SUBJECT NUMBER TWO

SHRIMP

The shrimp population reared in North Carolina, South Carolina, Georgia and North Florida can be divided into two groups viz. migratory and non-migratory. The individual spawned early in the season compose the migratory group and those spawned later compose the non-migratory group. The non-migratory group winters in the general locality in which it developes.

The greater portion of the shrimp reared in North Carolina, South Carolina, Georgia and North Florida are migratory moving south along the coast during the fall and wintering in Central Florida. Normally these return in the

spring, however, for the past few years the fishing of these migrant shrimp in Georgia and Florida has been so great that few of them survived to make the northward trip.

Because of the migratory nature of shrimp, control of the fishery cooperatively between the States of North Carolina, South Carolina, Georgia and Florida is needed. True conservation of the Atlantic shrimp supply cannot be obtained until all of the states involved enter into a joint program for the mutual benefit of all. J. M. Witsell, Chairman of the South Carolina State Board of Fisheries will, in the near future, confer with the heads of the conservation departments of Georgia and Florida in the hope of working out some plan by which we can have cooperation and reciprocal agreements so that the head of each of these departments can present them to the different legislatures of the above states and see if we can't get them enacted. The following resume and revue of the trend of the fishery will enable one more adequately to judge the present conditions. A nine year study of the life and habits of shrimp undertaken by the Bureau of Fisheries, Department [fol. 61] of the Interior, in cooperation with the conservation agencies of the states in the South Atlantic and Gulf has disclosed much that was previously unknown. The methods employed in securing this information included years in sampling the South Atlantic fisheries over the entire range, the tagging of thousands of shrimp from South Carolina to Florida, the collection of eggs, larvae and young through the fishery area to the fathom line from Cape Hatteras, North Carolina and a completed survey of the creeks, rivers, sounds and outside grounds of the fisheries in Georgia and North Florida, and a great store of general information acquired during the course of this investigation.

The accumulation of the facts secured by the above described means shows that the spawning occurs from March into September in the open waters of the Atlantic Ocean. At an early stage of their development the young shrimp move to brackish inside waters. These inside inland areas are nursery grounds of the young shrimp. As the young increase in size they seek waters of higher salinity. This results in the continued movement of young shrimp from creeks and rivers into sounds and, eventually, to the outside from the summer to the next spawning season. The first of these young have advanced sufficiently to appear in the

fishery by mid July. As the summer progresses the influx of the young into the fishery rapidly increas- until by September the fishery is practically entirely dependent upon this group of immature shrimp.

As the number of young shrimp increase in the fishery the number of spawning adults decrease and by September have practically disappeared from the fishery. However, with the warming of the waters in the spring the small shrimp that wintered in the more northern area begin to grow very rapidly and at the same time their sex products mature for the approaching spawning.

The shrimp industry has grown very materially during the past season over the previous season. I will show you the figures of the past season which was 1944-45 and the present season which is 1945-46. The boats operating in South Carolina in 1944-45 were 156 consisting of boats owned by the citizens of South Carolina 77 and boats owned outside, 79. The number of boats operating in our state in the 1945-46 season was 254. Number of boats owned by citizens of South Carolina was 154. Number of boats operating in state by outsiders was 100. We are very much [fol. 62] pleased to see the decided increase of the state owned boats operating in this state.

The number of pounds of shrimp caught during the season of 1944-45 in the coastal waters of South Carolina amounted to 2,548,955 lbs. Shrimp headed amounted to 1,535,355 lbs. in the 1944-45 season. Shrimp caught in the South Carolina waters in the 1945-46 season amounted to 5,037,065 lbs. Shrimp headed in the 1945-46 season amounted to 3,021,343 lbs. To be able to make this report is certainly a pleasure to the State Board of Fisheries as we are able to show that the catch of shrimp this season was nearly twice as large as in the previous year.

[fol. 63] EXHIBIT "D"

Excerpts from the Thirty-Sixth Annual Report of the South Carolina State Board of Fisheries Year Ending June 30, 1942, to the Governor and General Assembly

(Page 3) "We realize that conservation and enforcement of the laws is the best service that this Board can render the people of this State. In many states where the laws have not been enforced and conservation not taken care of

properly, the results have been a depleted condition of the fisheries. It is wise to take these matters in hand before it is too late; such as our General Assembly did last year in passing a bill relative to the size of crabs to be caught, which action, I think, will go a long way towards keeping our crabs from becoming scarce."

(Page 4) "There has been organized the Atlantic States Marine Fisheries Commission, of which South Carolina is a member, and this department is cooperating with them and hopes in the near future to get in touch with the heads of the commercial fishing industries of the adjoining states and see if it is possible to have uniform laws passed in these states, which we think in many instances would be beneficial to the fishing interests in these states where it is practical to do so."

(Page 15) "Shrimp means a great deal to South Carolina in the way of food and also provides employment for quite a large number of people. It furnishes to many of the inhabitants of the coastal section of South Carolina, in the way of negroes, who are not able to purchase food, considerable help; it also brings in considerable outside money to this State. It provides the citizens a volume of delightful food served in many ways upon their tables. It is of great service to the sport fishermen in the way of bait for catching fish."

[fol. 64] EXHIBIT "E"

Excerpts from the Thirty-Seventh Annual Report of the South Carolina State Board of Fisheries Year Ending June 30, 1943 to the Governor and General Assembly

(Page 3) "Now, more than ever, when seafood is in such demand from every side, the Board of Fisheries is devoting every effort possible to conserve and at the same time to produce more seafood for our citizens and armed forces."

(Page 5) "The South Carolina State Board of Fisheries is now a member of the Atlantic States Marine Fisheries Commission, and we have had some very interesting meetings with the other states that belong to this Commission, and we are now working very hard to perfect plans by which adjoining states could pass uniform laws which would be

beneficial to all, and in the near future we hope to be able to present these proposed laws to the General Assembly of the different states for their consideration."

[fol. 65] EXHIBIT "F"

Excerpts from the Thirty-Eighth Annual Report of the South Carolina State Board of Fisheries Year Ending June 30, 1944, to the Governor and General Assembly

(Page 4) "The board has a triple function in so far as all of its activities are concerned. The first is to conserve and develop our seafood products. The second, to see that the revenue is collected from the activities of commercial fishing as stipulated by law and the third, to see that the commercial fishing laws are enforced so as to protect and conserve the natural resources of our State."

(Pages 4-5) "The State Board of Fisheries, through its Chairman, J. M. Witsell, who is also Chairman of the South Carolina Branch of the Atlantic States Marine Fisheries Commission, and who with Senators J. D. Parler and Chas. J. Geilfuss are members of the Marine Fisheries Commission of South Carolina, have been doing all within their power to have uniform laws passed by the adjoining states which they feel in many instances would be very beneficial to the fishing interests of these states. Officers of the Marine Fisheries Commission have attended many meetings of the Atlantic States Marine Fisheries Commission and they feel that something has been accomplished along this line."

(Page 5) "This department tries in every way possible to cooperate with the people engaged in the seafood business so as to assist them in conducting their business on a profitable and businesslike basis. Due care is taken that the favors granted these operators do not interfere with the chief purpose and ultimate object of this department."

[fol. 66] EXHI

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needed food for our people."

[fol. 68] EXHIBIT "H"

Excerpts from the Fortieth Annual Report of the South Carolina State Board of Fisheries Year Ending June 30, 1946, to the Governor and General Assemly

(Page 4) "This department has a dual function to perform inasmuch as its duties are concerned first to conserve, develop, and make useful to the people of the State the vast potentialities in the products by the waters of this area. It also takes a great deal of planning, effort, time, etc., to see that the laws are enforced properly and that our natural resources have not been infringed upon and depleted. In handling the management of these large resources the Board has considered conservation and protection of the resources first and also has seen that the revenue required by law has been paid into the State. It has endeavored to stimulate the propagation of oysters in the natural beds."

(Page 5) "The fishing industry has changed greatly in the past few years, so has every other line of business, for instance, in enforcing the laws against the shrimpers who violate laws by coming into prohibited areas, not obtaining licenses and other violations, we formerly used in the enforcement of these laws small cabin cruisers and a speed boat, now we find that they are entirely inadequate for enforcement of these laws, therefore, we have now changed the method of enforcing these particular laws and employ airplanes by which we go into an area where these trawlers are violating the law and by flying down close to the water get the number of the boat, the exact place that he is fishing, the time of day that he was caught, measure the distance that he is fishing and establish whether or not he is in a polluted area and if so make an iron clad case against the law violator."

[fol. 69] EXHIBIT "I"

"The annual reports of the South Carolina State Board of Fisheries for the past five years were offered and received in evidence. They show that the cost of the Board's Operations exceeded the revenue collected in each of those years, the deficits being: For 1941-42 $5,221.04; for 1942-43 $5,979.92; for 1943-44 $8,517.80; for 1944-45 $9,005.50; and for 1945-46 $3,359.52."

[fols. 69a-70] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, et al., Appellants

vs.

J. M. WITSELL, et al., Appellees

ORDER APPROVING STIPULATION

The stipulation between counsel of the aforementioned parties under date of October 16, 1947 having been submitted to the Court, the same is hereby approved and ordered filed of record, nunc pro tunc as of the 16th day of October, 1947.

At Charlotte, North Carolina, this 3d day of December, 1947.

(S.) John J. Parker, Judge, U. S. Circuit Court of Appeals, Fourth Judicial Circuit.

[fol. 71] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. Davies, S. D. Collins, and The Atlantic Seafood Producers, Inc., a corporation, Plaintiffs,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. Young and J. A. Wilcox, composing the South Carolina State Board of Fisheries, a body corporate and Alonzo B. Seabrook, the Chief Inspector thereof, Defendants

ON SUBMISSION FOR FINAL DECREE

(Argued August 25, 1947)

Before Parker, Circuit Judge, and Wyche and Timmerman, District Judges

Robert E. Falligant, Thomas P. Bussey, Phyllis Kravitch and Aaron Kravitch, Attorneys for Petitioners; John M. Daniel, Attorney General for South Carolina. T. C. Calli-

son and J. Monroe Fulmer, Assistant Attorneys General, and Robinson & Robinson, Attorneys for Defendants.

OPINION—Filed September 13, 1947

[fol. 72] PARKER, Circuit Judge:

This is a suit by certain citizens of Georgia and a Florida corporation, engaged in fishing for shrimp in the coastal waters off the shores of the States of North Carolina, South Carolina, Georgia and Florida, against the individuals composing the South Carolina State Board of Fisheries, to enjoin the latter from enforcing against plaintiffs the provisions of the South Carolina statutes with respect to fishing for shrimp in South Carolina waters. Plaintiffs do not fish within the inland waters of South Carolina but within and beyond the three mile maritime belt of the coastal waters. They contend that the statutes are void as applied to them on the following grounds: (1) that the State of South Carolina has no jurisdiction of the coastal waters beyond low water mark; (2) that the statutes make arbitrary discrimination between residents and non residents of South Carolina in violation of the Privileges and Immunities clause (Art. IV sec. 2(1) of the Constitution and the Equal Protection clause of the Fourteenth Amendment; and (3) that the statutes impose a tax on imports and a burden on interstate commerce in violation of sections 8 and 10 of Art. I. Interlocutory injunction has been asked; a court of three judges has been convened pursuant to sec. 266 of the Judicial Code; and the case has been heard upon the merits and submitted for final decree.

The facts are that each of plaintiffs is operating boats engaged in fishing for shrimp off the shores of the states above named. The shrimp spend the Winter and multiply in the inland waters of the states and in the Spring and Summer months move out into the coastal waters, where they migrate southward in the Fall and Winter and northward in Spring and Summer. Fishing for them in the inland waters of South Carolina is absolutely forbidden and regulation of the fishing within the three mile maritime [fol. 73] belt is attempted by the statutes of which complaint is made. Section 3300 of the Code provides that these waters, as well as the inland waters, shall be "a common for the people of the state for the taking of fish". Sec. 3379 of the Code imposes an annual license fee of

$25.00 on boats engaged in shrimp fishing, if owned by residents of South Carolina, and of $2500.00, if owned by non residents, with provision that the license required of non residents be only $150.00 if they have operated boats in South Carolina during each of the preceding three years, but that not more than one hundred licenses be issued to non residents. Sec. 3374 imposes a tax of one-eighth cent per pound on green shrimp taken or "canned, shucked or shipped for market"; and sec. 3414 requires all boats licenses to trawl for shrimp in the waters of the state to "unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another state or the waters thereof". Violation of this provision is punishable by a fine of $500.00 or one year's imprisonment or both. Sec. 3407 provides punishment of $1,000.00 fine or six months imprisonment for other violations of the article regulating fisheries for which specific punishment is not otherwise provided.

Preliminary questions have been raised as to the jurisdiction of the court and as to whether injunctive relief is appropriate. It is clear, however, that there is diversity of citizenship and that the cause of action asserted by plaintiffs arises under the Constitution of the United States. Plaintiffs cannot bring themselves within the $150.00 license provision, and as to one or more of them the license fees which they will be required to pay under the act will amount to $5,000.00 or more. If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue [fol. 74] trawling in South Carolina waters, and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that, if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves. Ex Parte Young 209 U. S. 123, 155, 162; Kennington v. Palmer 255 U. S. 100; Terrace v. Thompson 253 U. S. 197, 214; Packard v. Banton 264 U. S. 140, 143. The statutes involved are clear and there is no such need for interpretation or other special circumstances as would warrant the Court in staying action pending proceedings in courts of the state, as was

held proper in American Federation of Labor v. Watson 327 U. S. 582, 595, 599.

Defendants point to the fact that certain of plaintiffs have been found guilty of criminal violation of the statutes and say that in proper application of the clean hands doctrine they should not be heard by a court of equity. It is well settled, however, that courts of equity "do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, id., sec. 100. Pomeroy, id., sec. 399. They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion". Keystone Driller Co. v. General Excavation Co. 290 U. S. 240, 245-246; George N. Mas v. The Coca Cola Co., 4 Cir. — F. 2d. —. The matter involved in suit here is the constitu- [fol. 75] tionality of the statutes complained of by plaintiffs, and neither this question nor the equitable relationship of the parties could possibly be affected by plaintiffs' disobedience of the statutes; and, at all events, the matter is one resting in our discretion, and we should not exercise that discretion to refuse a hearing to one who complains that state legislation affecting others as well as himself is violative of rights guaranteed by the Constitution of the United States.

We come then to the principal question in the case, which is whether the statutes are void on the ground that the state has no such jurisdiction over the coastal waters within the three-mile maritime belt as would support such legislation. The question is raised because of the recent decision of the Supreme Court in United States v. California, 67 S. Ct. 1658; but, for reasons hereinafter set forth, we do not regard that decision as controlling, in the absence of any assertion of rights by the federal government. The power of the states over such waters and the fishing rights in them is well settled by a long line of decisions, and we do not understand that it was intended by the decision in the California case to overrule these or to question in any respect the law as declared by them. On the contrary the Court

was at great pains in the California case to distinguish the cases which dealt with the power of the states over fishing in coastal waters.

The right of the state to control the fish running in tide waters was laid down in an opinion by Chief Justice Waite in McCready v. Virginia, 94 U. S. 391, 394, as follows:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. Pollard's Lessee v. Hagan 3 How. 212; Smith v. Maryland 18 How. 74; Mumford v. Wardell 6 Wall. 436; Weber v. Harbor Commissioners 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people [fol. 76] in their united sovereignty. Martin v. Waddell 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common—for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

That this right over fisheries applies within the three mile maritime belt and not merely to inland waters was laid down unequivocally in Manchester v. Commonwealth of Massachusetts, 139 U. S. 240, where, however, the precise question related to the control of fishing in Buzzard's Bay. The Court said:

> "Therefore, if Massachusetts had continued to be an independent nation, her boundaries on the sea, as de-

fined by her statutes, would unquestionably be acknowledged by all foreign nations, and her rights to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory of the nation in which they lie. * * * We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State."

In Louisiana v. Mississippi, 202 U. S. 1, 52, relating to a complicated boundary dispute between the states named, Chief Justice Fuller stated the rule as follows, citing McCready v. Virginia and Manchester v. Massachusetts, viz.:

"The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

[fol. 77] Directly in point is the Abby Dodge, 222 U. S. 166. That case involved a federal statute prohibiting a certain type of sponge fishing in the Gulf of Mexico or straits of Florida. The court construed the statute as not having relation to waters within the maritime belt on the ground that fishing there was subject to the control of the state. Directly in point, also, is the case of Skiriotes v. Florida, 313 U. S. 69, which dealt with a statute of Florida which forbade the use of diving equipment for the purpose of taking commercial sponges within the maritime belt as defined by Florida law. Holding that the statute was a valid exercise of state power and that there was no conflict with a federal statute

limiting the size of sponges which might be taken outside state territorial limits, the court said:

> "According to familiar principles, Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary legislation otherwise valid is not impaired. * * * It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation is within the police power of the state.*" (Italics supplied).

It is worthy of note that, in the case of United States v. California, supra, the Supreme Court quoted from the case of Skiriotes v. Florida, italicizing the language which we have italicized in the above quotation. All four of the cases which we have cited were cited by the Supreme Court and distinguished in the California case; and there was no suggestion that they were being overruled. The California case held that the state was not the owner of the land under the ocean within the maritime belt, and that it could not claim the oil to be derived therefrom against the claim of the United States; but the established doctrine that the state might exercise police power over the maritime belt and control fishing therein was not questioned in the opinion or affected in any way my the decision. It is clear that [fol. 78] very different considerations should govern the decision as to who is to exercise police power over the marginal seas, which can easily be used to interfere with law enforcement on land, or as to who is to control fishing in areas which mean so much to the support of large numbers of people who live near the sea, from those which should govern as to who is to control in the maritime belt the oil to be secured from the land under the ocean, a matter which could easily lead to international controversy. The United States has asserted its paramount authority with respect to oil, but no such authority with respect to fish or fishing: and we see no reason why we should not follow the well settled line of decisions which hold that, in the absence of action by the federal government, the power as to these rests in the several states. If these decisions are to be overruled, the matter is one for the Supreme Court and not for us.

Plaintiffs contend that until the enactment of the fisheries law of 1924 no authority was asserted by the State of South Carolina over the maritime belt and that it was not within the boundaries of the state as set forth in the statute defining them. Code sec. 2038. An examination of the statute, however, shows that the boundary on the east is given as the Atlantic Ocean; and there is nothing in this inconsistent with the intent to exercise authority over the maritime belt in accordance with what is customary under the law of nations. Even if there were, it is elementary that acts of a legislature do not limit the power of future legislatures; and there is no reason why the legislature of 1924 should not exercise the power which under the law of nations and the decisions of the Supreme Court was unquestionably possessed by the state.

We come, then, to the second point made by plaintiffs, i.e., that the discrimination between residents and non residents in the amount of the license fee exacted is violative [fol. 79] of the Privileges and Immunities clause of Article IV of the Constitution and the Equal Protection clause of the Fourteenth Amendment. It is well settled, however, that these constitutional provisions do not require the state to accord equality of treatment to non residents and residents with respect to the taking of fish or animals ferae naturae, the ownership of which is in the state for the benefit of its inhabitants. Geer v. Connecticut, 161 U. S. 519; Ward v. Race Horse, 163 U. S. 504; Patsone v. Pennsylvania, 232 U. S. 138; Haavik v. Alaska Packers' Association, 263 U. S. 510; Locoste v. Department of Conservation, 263 U. S. 545; In re Eberle, 98 F. 295; Anderson v. Smith, 71 F. 2d 493; Commonwealth v. Hilton, 174 Mass. 30, 54 N. E. 362, 45 L. R. A. 475, 478. In the case last cited the rule applicable is stated by the Supreme Judicial Court of Massachusetts as follows:

> "It is now settled that the right of regulation and control of fisheries by the several states in the legislation that secures the benefits of this public right in property to its own inhabitants. The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of inhabitants of any state, rights in common property of the inhabitants of other states. McCready v. Virginia 94 U. S. 391, 24

L. Ed. 248; Wharton v. Wise 153 U. S. 155, 38 L. Ed. 669; Corfield v. Coryell 4 Wash. C. C. 371; Blake v. McClung 172 U. S. 239-249, 43 L. Ed. 432-436."

In the language of Mr. Justice Holmes in Patsone v. Pennsylvania, supra, "It is to be remembered that the subject of this whole discussion is wild game (shrimp), which the state may preserve for its own citizens as it pleases." The benefit to be derived from these shrimp, produced in the inland waters of the state and constituting a valuable source of food and income for large numbers of its people, will be largely lost if out of state fishing boats are allowed to prey upon them without let or hindrance. It is unquestionably within the power of the state, as a proper conservation measure, to require of out of state fishermen a license fee [fol. 80] so high as to limit their number and to reimburse the people of the state in some measure for the loss sustained by them from the fishing of those who are licensed.

Plaintiffs rely upon Pavel v. Richard, 28 F. Supp. 992; but that case is not in point. What was there decided was the special case that a non resident land owner who used his property for raising fur bearing animals was denied the equal protection of the laws by a statute which imposed disproportionate license fees on non resident trappers with whom he had entered into contracts to trap on the property. The general rule that the state may exact higher license fees of non resident hunters and fishermen than of residents and may even exclude non residents from taking fish and game within the state was not considered and no indication was given of any intent to depart from it. If the case could be so interpreted, we should think it not well decided.

There is nothing in the importation or interstate commerce points. With the decision as to the power of the state over fishing in the maritime belt, the whole basis of the importation point goes out of the case. As to interstate commerce, the requirement that the shrimp destined for out of state shipment be stamped and properly packed is a proper regulatory provision. It has reasonable relation not only to maintaining the good reputation of products originating in the state but also to insuring the collection of the one-eighth cent per pound tax, which in the absence of some such requirement could be easily evaded on shrimp shipped out of the state. It is too well settled to admit of argument that a state may regulate the export of articles

in which it has a special property, such as wild game or fish, even if interstate commerce be indirectly affected by the restriction. Geer v. Connecticut, supra; Rupert v. United States, 8 Cir. 181 F. 87; State v. Harrub, 95 Ala. 176, 15 [fol. 81] L.R.A. 761, 36 Am. St. Rep. 195; McDonald v. Sou. Exp. Co., 134 F. 282; 22 Am. Jur. p. 697; note 32 A.L.R. 336 et *seq.*, and cases there cited. It is equally well settled that a tax on articles produced within a state will be sustained, even though they be intended for interstate shipment, where, as here, the tax does not discriminate against interstate commerce and interstate transportation has not commenced. Coe v. Errol, 116 U. S. 517; Heisler v. Thomas Colliery Co., 260 U. S. 245, 258; Hope Natural Gas Co. v. Hall, 274 U. S. 284; Ohio Oil Co. v. Conway, 281 U. S. 146; South Carolina Power Co. v. South Carolina Tax Commission, 52 F. 2d 515; s.c. 286 U. S. 525, 60 F. 2d 528, 288 U. S. 188. Since the tax on shrimp here involved was levied without discrimination against interstate commerce, it was valid; and the requirement for packing and stamping was valid as a proper means of preventing tax evasion. It was proper, also, because of the special property of the people of South Carolina in the shrimp taken within the state.

Argument is made that the tax and requirement for fishing and stamping are invalid because applicable to shrimp caught beyond as well as to those caught within the three mile limit. It would be entirely impractical, however, to differentiate between shrimp taken within and without the limit; and those who avail themselves of the privilege of fishing within the limit are properly required to report their entire catch, since otherwise the reasonable provisions of the statute would be unenforceable. See Mirkovich v. Milnor, 34 F. Supp. 409; Bayside Fish Flour Co. v. Gentry, 297 U. S. 422. In the case last cited, where complaint was made that a California statute applied to fish taken beyond the waters over which the state had jurisdiction, the Court said:

> "Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals [fol. 82] with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to

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For the reasons stated, we
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dismissed.

Injunction denied and cas

We concur in the foregoing

(S.) John J. Parker,
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Western District o

designation in the Eastern District of South Carolina; George Bell Timmerman, U. S. District Judge for the Eastern and Western Districts of South Carolina.

[fol. 83] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 13, 1947

The Court makes the following findings of fact:

1. The individual plaintiffs are citizens and residents of the State of Georgia and the corporate plaintiff is a corporation created and existing under the laws of the State of Florida. The defendants are citizens and residents of the State of South Carolina composing the Board of Fisheries of that state and charged by law with the enforcement of the statutes of which plaintiffs complain in this suit. The claim of plaintiffs arises out of and is based upon the Constitution of the United States. The amount in controversy exceeds the sum and value of three thousand dollars.

2. Plaintiffs are engaged in fishing for shrimp within and without the three mile maritime belt of the ocean off the shores of the State of South Carolina and defendants are demanding of them that they pay an annual license fee of $2500.00 for each boat engaged in shrimp fishing within the maritime belt, as prescribed by Code sec. 3379 as amended, that they pay a tax of one-eighth of a cent a pound on all shrimp caught by boats fishing within the maritime belt, even though some of such shrimp may have been caught beyond the maritime belt, as provided by Code sec. 3374, [fol. 84] and that they bring all of such shrimp into port and properly pack and stamp them there before shipping them into other states, as provided by Code sec. 3414. Defendants threaten that, if plaintiffs fish for shrimp in the maritime belt without complying with these provisions of the Code, defendants will prosecute them under the penal provisions of the Code, which provide fine and imprisonment for violation of these statutory provisions, and plaintiffs will be unable to continue their business if these statutory penalties are invoked against them.

3. Plaintiffs contend that the provisions of the statutes above mentioned are void as applied to them for that (1) the State of South Carolina is without jurisdiction to exercise statutory authority over fishing within the three mile maritime belt as attempted by said statutes, (2) they are violative of the Privileges and Immunities clause of Article IV of the Constitution and the equal protection clause of the 14th Amendment, in that they discriminate between residents and non residents of the state, and (3) that they impose a burden on interstate commerce and a tax on imports in violation of the Commerce clause of the Constitution. They have submitted the case for final decree.

4. If the contentions of plaintiffs as to the invalidity of the statutes were valid, they would be irreparably damaged by their enforcement and have no adequate remedy at law, in that they would be forced by defendants to pay large sums by way of taxes for which no means of recovery is provided by law, or to desist from fishing in the maritime belt off the coast of South Carolina, which would result in the loss of business for which no compensation is provided, the tax or the injury in case of some of the plaintiffs being well in excess of $3,000.00.

[fok 85] The Court states its conclusions of law as follows:

1. The statutes involved are not beyond the powers of the legislature to regulate fishing for shrimp in the three mile maritime belt off the shores of South Carolina, in the absence of any legislation by Congress with respect to the subject matter.

2. The statutes do not violate the Privileges and Immunities clause of the Fourth Article of the Constitution or the Equal Protection clause of the Fourteenth Amendment.

3. The statutes do not impose an import duty or burden interstate commerce in violation of section 8 or 10 of Article I of the Constitution.

4. The plaintiffs are not entitled to the injunction prayed and their suit should be dismissed.

This the 12th day of September, 1947.

(S.) John J. Parker, U. S. Circuit Judge, Fourth Circuit; C. C. Wyche, U. S. District Judge for the Western District of South Carolina, sitting by designation in the Eastern District of South Carolina. George Bell Timmerman, U. S. District Judge for the Eastern and Western Districts of South Carolina.

[fol. 86] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. Davies, S. D. Collins, and The Atlantic Seafood Producers, Inc., a corporation, Plaintiffs,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. Wilcox, composing the South Carolina State Board of Fisheries, a body corporate, and Alonzo B. Seabrook, the Chief Inspector thereof, Defendants

FINAL DECREE—Filed September 13, 1947

This cause coming on to be heard by consent at Spartanburg, South Carolina, on application of plaintiffs for an interlocutory injunction to restrain defendants, officers of the State of South Carolina, from enforcing statutes of that state on the ground that they contravene provisions of the Constitution of the United States; and a court of three judges having been convened pursuant to section 266 of the Judicial Code; and evidence having been taken, and arguments of counsel heard and the cause having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith; and the Court being of opinion, for the reasons set forth in the written opinion filed herewith, that the application for injunction should be denied and that the suit should be dismissed:

Now, therefore, it is ordered, adjudged and decreed that the application of plaintiffs for an injunction be and same is hereby denied, and that the suit be and it is hereby dismissed at the cost of plaintiffs.

This the 12th day of September, 1947.

(S.) John J. Parker, U. S. Circuit Judge, Fourth Circuit; C. C. Wyche, U. S. District Judge for the Western District of South Carolina, sitting by designation in the Eastern District of South Carolina. George Bell Timmerman, U. S. District Judge for the Eastern and Western Districts of South Carolina.

[fol. 87] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed October 3, 1947

And Now Come the Plaintiffs, Earl J. Toomer, Joseph A. Cesaroni, Joseph DeGracia, S. W. Davies, S. D. Collins, and the Atlantic Seafood Producers, Inc., a corporation, and considering themselves aggrieved by the final judgment and decree of the District Court of the United States for the Eastern District of South Carolina, Charleston Division, entered herein on the 13th day of September, 1947, wherein the said Court consisting of the Honorable John J. Parker, U. S. Circuit Judge for the Fourth Circuit, the Honorable C. C. Wyche and Honorable George Bell Timmerman, District Judges, specially constituted under Section 266 of the Judicial Code, denied plaintiff's petition to enjoin the enforcement of certain State Statutes of South Carolina and dismissed petitioners' case, do hereby pray that an appeal be allowed to the Supreme Court of the United States herein for the correction of the errors complained of, and for an order fixing the amount of the bond thereon from said final order and decree, the errors alleged to have been committed to the prejudice of the plaintiffs are set forth in the Assignments of Error which are filed herewith with this petition, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 30th day of Sept. —, 1947.

Aaron Kravitch, Robert E. Falligant, Phyllis Kravitch, Attorneys for Plaintiffs.

[fol. 88] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 3, 1947

Plaintiffs file the following assignment of errors upon which they will rely on their appeal to the Supreme Court

of the United States from the judgment of this Court entered September 13th, 1947:

The District Court of the United States for the Eastern District of South Carolina, Charleston Division, erred in the following particulars, to-wit:

1. In concluding as a matter of law that the Statutes of the State of South Carolina with respect to the fishing for shrimp within and beyond the three mile maritime belt of the coastal waters of said state are not invalid and unconstitutional as applied to them, for the reason that the State of South Carolina has jurisdiction of said coastal waters beyond the low water mark on the coast thereof and that the legislature of South Carolina may regulate fishing for shrimp in the three mile maritime belt off the shores of said State in the absence of any legislation by Congress to the contrary with respect to the subject matter.

2. That the Court erred in concluding as a matter of law that the said Statutes do not violate the Privileges and Immunities clause, Art. IV Sec. 2 (1) of the Constitution and the Equal Protection clause of the Fourteenth Amendment thereto.

3. The Court erred in concluding as a matter of law that said Statutes do not impose a tax on imports and a burden on interstate commerce in violation of Sections 8 and 10 of Art. 1 of the Constitution of the United States.

[fol. 89] 4. That the court erred in concluding as a matter of law that South Carolina had the legal right to discriminate between the citizens of South Carolina and other states as to a differential of Twenty-five ($25.00) Dollars per year license as applied to residents of South Carolina and a Twenty-five hundred ($2,500) Dollar per year license for residents of other states, and in also requiring non-residents to pay an income tax on fish caught in the ocean by such non-residents and sold outside of the State of South Carolina, and in also limiting the permits issued to non-residents, all of which acts the court held were not illegal, confiscatory or unreasonable discrimination.

5. That the court erred in concluding as a matter of fact and law that the Statutes attacked were conservation measures and within the police powers of the State, the error being that the record and the evidence showed that said Statutes were not conservation measures, but purely tax measures, and said regulations were adopted and used to

discriminate and prohibit fishing by non-residents, and for the purpose of creating a monopoly in favor of the residents of South Carolina.

6. That the Court erred in dismissing plaintiffs' suit and denying the injunctive relief prayed for therein.

Wherefore, Plaintiffs' pray that the said judgment and decree entered in the above entitled cause be reversed and a judgment rendered in favor of plaintiffs and that the plaintiffs be awarded their costs of this appeal.

Aaron Kravitch, Robert E. Falligant, Phyllis Kravitch, Attorneys for Plaintiffs.

[fols. 90-97] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 3, 1947

It appearing to the Court that the Plaintiffs have filed their petition for appeal to the Supreme Court of the United States and have filed therewith their assignment of errors and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree in question.

It is ordered that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the judgment and decree rendered and entered in this cause on the 13th day of September, 1947, and that said plaintiffs give bond with good and sufficient security in the sum of Two Hundred fifty ($250) dollars and that they as Appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good.

It is further ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States under the Rules thereof in such cases made

and provided; and it is further ordered that citation issue returnable forty (40) days from the date thereof.

Dated this 2 day of October, 1947.

(S.) John J. Parker, U. S. Circuit Judge, Fourth Circuit.

[fol. 98] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON—Filed November 3, 1947

In accordance with the provisions of paragraph nine (9) of Rule Thirteen (13) of the Supreme Court of the United States, appellants designate as necessary for the determination of said case, a statement of the points to be relied upon by them, viz:

1. That the State of South Carolina did not have the authority to enact the various statutes under attack in this case because it lacked the jurisdiction to enact tax laws beyond the low water mark of the Atlantic Ocean bounding its border on the East, as set out in Section 2038 of the Civil Code of 1942 of the State of South Carolina.

2. That the State of South Carolina did not have the legal right to enact the statute set out in said petition which required a tax to be paid on all shrimp caught on the open sea and which required that said shrimp be brought into the ports of South Carolina for the purposes of taxation, which statute is in violation of the power of a state to tax imports.

3. That the State of South Carolina did not have the legal right to enact the statute set out in the petition known as Sec. 3414 of the Civil Code of the State of S. C. 1942 which [fol. 99] required that shrimp caught off the coast of S. C. be brought into the ports of that State for icing and packing and a payment of a tax on the shrimp to be shipped beyond the limits of the State, said statute being violative of the equal protection, due process, privilege and immunities and an undue burden on commerce, and was not a valid and bona fide health, conservation or police regulation.

4. That the State of South Carolina did not have the legal right to enact the statute set out in the petition and known as amended act of Sec. 3379 of the 1942 Civil Code of S. C., which statute limited the number of licenses which could be issued to non-residents while permitting an unlimited num-

ber to residents and which required that non-residents pay a license of $2500 per year while residents only were required to pay $25 per year, and also required as a preliminary requisite that non-residents pay income tax for preceding years to South Carolina, said statute being violative of the equal protection, due process, privilege and immunities, and commerce clauses of the Const. of the U. S.

5. That the statutes set out in appellant's petition were all part of a general plan or scheme to discriminate unfairly and unjustly against non-residents, and said various acts were so onerous that said non-residents could not shrimp profitably in the waters off S. C. and said statutes were neither bona fide health, regulatory or conservation measures, and being violative of the equal protection, due process, privilege and immunities, and the commerce clauses.

[fol. 100] 6. That appellants had the right to file said bill in equity in a Federal Court of equity, and under the pleadings, evidence and the law were entitled to the relief sought.

7. That the three Judge Federal Court erred in refusing to render a decree in favor of the appellants, the evidence and the law demanding a finding in their favor.

8. That the Supreme Court has jurisdiction to entertain said appeal, and that the facts are of such national importance, and the law involved of such a substantial nature, that said Court should hear said appeal, and subsequently thereafter render decision in favor of appellants on the merits of said appeal.

This October 29, 1947.

John J. Bankou, Robert E. Falligant, Aaron Kravitch, Phyllis Kravitch, Attorneys for appellants.

P. O. Address: Savannah, Georgia.

[fol. 101] ACKNOWLEDGEMENT OF SERVICE

Due and legal service of the within Statement of the Points to be relied on acknowledged. Copy had and received. All other and further service waived.

This October 30, 1947.

John M. Daniel, Attorney General; T. C. Callison, Asst. Atty. Gen.; J. Monroe Fulmer, Asst. Atty. Gen.; Robinson & Robinson, Of Counsel, Attorneys for Appellees.

[fol. 102] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION OF THE RECORD—Filed November 3, 1947

In accordance with the provisions of paragraph nine (9) of rule Thirteen (13) of the Supreme Court of the United States, appellants designate as necessary for the determination of the issues involved in the aforementioned case, the following portions of the record, viz:

(1) The original petition filed by the plaintiffs and,
(2) Amendment to said petition and,
(3) Motion, demurrers and answers filed by the defendants, and
(4) Agreed evidence in said case, and
(5) Opinion and judgment of the Court, and
(6) Jurisdictional statement, and
(7) Motion for appeal, order allowing same and grounds for appeal, and
(8) All other parts of the record designated in the stipulations agreed to between counsel.
(9) This designation of the record, and statement of the points to be relied upon.

Note plaintiffs are appellants herein, and defendants are appellees herein.

This October 29, 1947.

John J. Bankon, Robert E. Falligant, Aaron Kravitch, Phyllis Kravitch, Attorneys for Appellants.

[fol. 103] ACKNOWLEDGEMENT OF SERVICE

Due and legal service of the within Designation of the Record acknowledged. Copy had and received. All other and further service waived.

This October 30, 1947.

John M. Daniel, Attorney General; T. C. Callison, Asst. Atty. Gen.; J. Monroe Fulmer, Asst. Atty. Gen.; Robinson & Robinson, Of Counsel, Attorneys for Appellees.

[fol. 103a] [File endorsement omitted.]

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 24, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 52,645. Eastern South Carolina, D. C. U. S. Term No. 415. Earl J. Toomer, Joseph A. Cesaroni, Joseph DeGracia, et al., Appellants, vs. J. M. Witsell, Edward E. Burroughs, E. L. Sweat, et al., etc. Filed October 27, 1947. Term No. 415 O. T. 1947.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, ET AL.

Appellants,

vs.

J. M. WITSELL, EDWARD M. BURROUGHS, E. L. SWEAT, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION

AARON KRAVITCH,
ROBERT E. FALLIGANT,
PHYLLIS KRAVITCH,
JOHN J. BOUHAN,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, AND THE ATLANTIC SEAFOOD PRODUCERS, INC., A CORPORATION, PLAINTIFFS,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG AND J. A. WILCOX, COMPOSING THE SOUTH CAROLINA STATE BOARD OF FISHERIES, A BODY CORPORATE AND ALONZO B. SEABROOK, THE CHIEF INSPECTOR THEREOF, *Defendants.*

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The plaintiffs-appellants, having presented this day their petition for appeal, now file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

(A) The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from the final order, judgment or decree which dismisses the suit by plaintiffs-appellants

and denies the application for an interlocutory injunction therein to restrain individuals composing the South Carolina State Board of Fisheries from enforcing against plaintiffs-appellants certain South Carolina Statutes which provide that the coastal waters beyond the low water mark within the three mile maritime belt shall be a common for the people of the State of South Carolina for the taking of fish and imposing an annual license fee of Twenty-five ($25.00) Dollars on boats engaged in shrimp fishing therein if owned by residents of South Carolina and a license fee of Twenty-five hundred ($2,500.00) Dollars if owned by non-residents and further limiting the issuance of non-resident licenses to one hundred (100) and imposing tax of one-eighth (⅛) cent per pound on green shrimp taken or shipped from said state and requiring all boats licensed to trawl for shrimp in the coastal waters within three miles of the ordinary low water mark on the coast of said State to unload their catch of shrimp and pack and properly stamp the same within the State of South Carolina before shipping or transporting it to another state or the waters thereof and imposing punishment for the violation thereof.

The final order, judgment or decree here appealed from was entered in the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on September 13th, 1947, by a statutory court consisting of one Circuit and two District judges specially convoked under and by virtue of the provisions of Section 266 of the Judicial Code (28 U.S.C.A., sec. 380). The said statute concludes as follows:

"... and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final

order, judgment or decree in question by virtue of the express provisions last above set forth.

Paramount Pictures v. *Langer*, 306 U. S. 619, 83 L. Ed. 1025, 59 Sup. Ct., 641.

(B) The State Statutes and Administrative Orders Which Are Involved

The plaintiffs complaint contends that certain statutes of the State of South Carolina are void and unconstitutional as applied to them upon the following grounds:

1. That the State of South Carolina has no jurisdiction of the coastal waters or ocean within the three-mile maritime belt lying seaward of the ordinary low water mark on the coast thereof.

2. That the said Statutes as applied to plaintiffs make an arbitrary and unreasonable discrimination between residents and non-residents of the State of South Carolina in violation of the Privileges and Immunities clause (Art. IV sec. 2 (1) of the Constitution, and the Commerce clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment; and,

3. That the Statutes impose a tax on imports and a burden on interstate commerce in violation of Sections 8 and 10 of Art. 1.

4. That said Statutes are not bona fide conservation measures, and were passed and operate to illegally deny citizens of other states rights granted to residents of South Carolina, and designed to perpetuate and create a monopoly to the citizens of South Carolina in the shrimp industry.

The Statutes of the State of South Carolina above referred to provide in substance as follows:

Section 3300 of the Code of South Carolina provides that all waters in the maritime belt within three miles seaward of the low water mark of the coast of the State of South Carolina shall be a "common for the people of the State for taking of fish" and requiring that licenses be secured from the State of South Carolina for that purpose.

Section 3379 of the Code of South Carolina requires all fishing boats owned by residents of South Carolina to obtain an annual license for the sum of Twenty-five ($25.00) Dollars and all fishing boats owned by non-residents of said state to secure an annual license for the sum of Twenty-five hundred ($2,500.00) Dollars, provided that licenses required of non-residents who have operated their boats in South Carolina during each of three preceding years may be secured by said non-residents for One hundred fifty ($150.00) Dollars and further limiting the number of non-residents fishing licenses to one hundred.

Section 3374 of the Code of South Carolina imposes a tax of one-eighth (⅛) cent per pound on all green shrimp taken in the ocean waters within the three mile maritime belt of said State as hereinbefore set forth.

Section 3414 of the Code of South Carolina requires all boats licensed to trawl for shrimp in the maritime belt or ocean waters within three miles of the low water mark of the coast thereof to bring their catch of shrimp and fish into the ports of South Carolina where they shall be unloaded, packed and properly stamped before shipping or transporting to another State or the waters thereof.

Section 3407 of the Code of South Carolina provides Penalties of One thousand ($1,000.00) Dollars fine and im-

prisonment of not more than six months for violation of the foregoing statutes.

(C) The Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and appeared of record on September 13, 1947. The petition for appeal herein was presented and filed on October 3rd, A. D. 1947.

(D) Statement Showing That the Nature of the Case and of the Ruling of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied Upon.

The complaint attacked the validity and constitutionality not only of the foregoing Statutes but also the jurisdiction of the State of South Carolina over the ocean waters within the three miles maritime belt from the low water mark on the coast of the State of South Carolina.

On August 18th, 1947, a hearing on the temporary restraining order was held before a District Judge who set the hearing on the prayer for an interlocutory injunction for a date certain and called one Circuit Judge and one District Judge to his assistance as required by Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380).

On August 25th, 1947, a final hearing was held on the application for interlocutory injunction and thereafter on September 13th, 1947, the same three judges entered a final judgment, and decree dismissing plaintiffs' complaint and denying the application for interlocutory injunction.

The case was heard and determined and the final judgment and decree was predicated upon the issues raised by

the plaintiffs' complaint and the defendants' return and answer and were in substance as follows:

(1) Whether a Federal Court of Equity had jurisdiction to entertain the application for injunction,

(2) Whether the plaintiffs were entitled to relief in equity because of having violated an equitable maxim of not coming into court with clean hands,

(3) Whether the statutes attacked were unconstitutional and,

(4) Whether the plaintiffs were entitled to the relief which they sought or whether the proceedings should be remanded to a State Court.

The Court in its decree held that the plaintiffs had a right to come into a Federal Court of Equity, that they had not violated any equitable maxim, and that the case did not have to be remanded back to the State Courts; however, on the general broad basic proposition the Court held that the statutes were not unconstitutional and the plaintiffs, because of said fact, were not entitled to the relief sought.

The sole issue, therefore, for determination by this Court is the constitutionality of the Statutes of the State of South Carolina as enumerated in the pleadings.

(E) The Issues Involved Are of National Importance

In that they affect the rights of fishing interests in many of the coastal states, and it is necessary that the rights of the various states be established in order to clarify a situation which is confusing and likely to cause recrimination by states against states and lead to a series of repressive measures by various states against the alleged offending states.

(F) The Amount Involved Is Substantial

In that the property losses in the present case according to the record amount to more than $100,000.00 a year as applied only to petitioners, a mere segment of the fishing interests of one state.

(G) Substantial Federal Questions Are Raised

For the first time on the question of a State to attempt to pass tax measures under the guise of conservation measures for the purpose of barring non-residents from fishing in the ocean off the shores of a state, there being no decision of the Supreme Court on this precise question, although there have been one or more conflicting Circuit Court of Appeal decisions.

Proposition and Authorities

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final order, judgment or decree herein questioned:

Ex Parte Young, 209 U. S. 123, 155, 162;
Kennington v. *Palmer*, 255 U. S. 100;
Terrence v. *Thompson*, 253 U. S. 194, 214;
Packard v. *Barton*, 264 U. S. 140-143.

Statement Respecting Opinions

The Court below delivered a written opinion, a large part of which is devoted to the discussion of the jurisdiction of the Court over the subject matter and whether or not injunctive relief was appropriate in the instant case. In this connection the Court said:

> "It is clear, however, that there is diversity of citizenship and that the cause of action asserted by the plaintiffs arises under the Constitution of the United

States. Plaintiffs cannot bring themselves within a $150.00 license provision and as to one or more of them, the license fees which they are required to pay under the act will amount to $5,000.00 or more. If they should not pay the license the criminal penalties which would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves".

In addition to rendering a written opinion in the above listed case the Court below made certain findings of fact and conclusions of law in connection with the entry of the decree in question. Copies of these findings and conclusions of law and of the final decree herein are reproduced as Appendices A, B and C and attached to this jurisdictional statement.

Respectfully submitted,

JOHN J. BOUHAN,
AARON KRAVITCH,
ROBERT E. FALLIGANT,
PHYLLIS KRAVITCH,
Attorneys for Appellants.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a Corporation, *Plaintiffs*,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. WILCOX, Composing the South Carolina State Board of Fisheries, a Body Corporate and ALONZO B. SEABROOK, the Chief Inspector Thereof, Defendants

ON SUBMISSION FOR FINAL DECREE

(Argued August 25, 1947. Decided —— —, —)

Before Parker, Circuit Judge, and Wyche and Timmerman, District Judges

Robert E. Falligant, Thomas P. Bussey, Phyllis Kravitch and Aaron Kravitch, Attorneys for Petitioners; John M. Daniel, Attorney General for South Carolina, T. S. Callison and J. Monroe Fulmer, Assistant Attorneys General, and Robinson & Robinson, Attorneys for Defendants.

PARKER, *Circuit Judge*:

This is a suit by certain citizens of Georgia and a Florida corporation, engaged in fishing for shrimp in the coastal waters off the shores of the States of North Carolina, South Carolina, Georgia and Florida, against the individuals composing the South Carolina State Board of Fisheries, to enjoin the latter from enforcing against plaintiffs the provisions of the South Carolina statutes with respect to fishing for shrimp in South Carolina waters. Plaintiffs do not fish within the inland waters of South Carolina but within and beyond the three-mile maritime belt of the coastal waters. They contend that the statutes are void as applied to them

on the following grounds: (1) that the State of South Carolina has no jurisdiction of the coastal waters beyond low water mark; (2) that the statutes make arbitrary discrimination between residents and non-residents of South Carolina in violation of the Privileges and Immunities clause (Art. IV, sec. 2 (1) of the Constitution and the Equal Protection clause of the Fourteenth Amendment; and (3) that the statutes impose a tax on imports and a burden on interstate commerce in violation of sections 8 and 10 of Art. I. Interlocutory injunction has been asked; a court of three judges has convened pursuant to sec. 266 of the Judicial Code; and the case has been heard upon the merits and submitted for final decree.

The facts are that each of plaintiffs is operating boats engaged in fishing for shrimp off the shores of the states above named. The shrimp spend the Winter and multiply in the inland waters of the states and in the Spring and Summer months move out into the coastal waters, where they migrate southward in the Fall and Winter and northward in Spring and Summer. Fishing for them in the inland waters of South Carolina is absolutely forbidden and regulation of the fishing within the three-miles maritime belt is attempted by the statutes of which complaint is made. Sec. 3300 of the Code provides that these waters, as well as the inland waters, shall be "a common for the people of the state for the taking of fish". Sec. 3379 of the Code imposes an annual license fee of $25.00 on boats engaged in shrimp fishing, if owned by residents of South Carolina, and of $2500.00, if owned by non-residents, with provision that the license required of non-residents be only $150.00 if they have operated boats in South Carolina during each of the preceding three years, but that not more than one hundred licenses be issued to non-residents. Sec. 3374 imposes a tax of one-eighth cent per pound on green shrimp taken or "canned, shucked or shipped for market"; and sec. 3414 requires all boats licensed to trawl for shrimp in the waters of the state to "unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another state or the waters thereof". Violation of this provision is punishable by a fine of $500.00 or one year's imprisonment or both. Sec. 3407 provides pun-

ishment of $1,000.00 fine or six months imprisonment for other violations of the article regulating fisheries for which specific punishment is not otherwise provided.

Preliminary questions have been raised as to the jurisdiction of the court and as to whether injunctive relief is appropriate. It is clear, however, that there is diversity of citizenship and that the cause of action asserted by plaintiffs arises under the Constitution of the United States. Plaintiffs cannot bring themselves within the $150.00 license provision, and as to one or more of them the license fees which they will be required to pay under the act will amount to $5,000.00 or more. If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters, and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that, if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves. Ex Parte Young 209 U. S. 123, 155, 162; Kennington *v.* Palmer, 255 U. S. 100; Terrace *v.* Thompson 253 U. S. 197, 214; Packard *v.* Banton 264 U. S. 140, 143. The statutes involved are clear and there is no such need for interpretation or other special circumstances as would warrant the Court in staying action pending proceedings in courts of the state, as was held proper in American Federation of Labor *v.* Watson, 327 U. S. 582, 595, 599.

Defendants point to the fact that certain of plaintiffs have been found guilty of criminal violation of the statutes and say that in proper application of the clean hands doctrine they should not be heard by a court of equity. It is well settled, however, that courts of equity "do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, id., sec. 100. Pomeroy, id., sec. 399. They apply the maxim, not by way of punishment for

extraneous transgressions, but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion". Keystone Driller Co. *v.* General Excavation Co., 290 U. S. 240, 245-246; George N. Mas *v.* The Coca Cola Co., 4 Cir. — F. 2d —. The matter involved in suit here is the constitutionality of the statutes complained of by plaintiffs, and neither this question nor the equitable relationship of the parties could possibly be affected by plaintiffs' disobedience of the statutes; and, at all events, the matter is one resting in our discretion, and we should not exercise that discretion to refuse a hearing to one who complains that state legislation affecting others as well as himself is violative of rights guaranteed by the Constitution of the United States.

We come then to the principal question in the case, which is whether the statutes are void on the ground that the state has no such jurisdiction over the coastal waters within the three-mile maritime belt as would support such legislation. The question is raised because of the recent decision of the Supreme Court in United States *v.* California, 67 S. Ct. 1658; but, for reasons hereinafter set forth, we do not regard that decision as controlling, in the absence of any assertion of rights by the federal government. The power of the states over such waters and the fishing rights in them is well settled by a long line of decisions, and we do not understand that it was intended by the decision in the California case to overrule these or to question in any respect the law as declared by them. On the contrary the Court was at great pains in the California case to distinguish the cases which dealt with the power of the states over fishing in coastal waters.

The right of the state to control the fish running in tide waters was laid down in an opinion by Chief Justice Waite in McCready *v.* Virginia, 94 U. S. 391, 394, as follows:

> "The principal has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. Pollard's Lessee *v.* Hagan, 3 How. 212; Smith *v.* Maryland, 18 How. 74; Mumford *v.* Wardell, 6 Wall. 436;

Weber *v.* Harbor Commissioners, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. Martin *v.* Waddell, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property rights, and not a mere privilege, or immunity of citizenship."

That this right over fisheries applies within the three mile maritime belt and not merely to inland waters was laid down unequivocally in Manchester *v.* Commonwealth of Massachusetts, 139 U. S. 240, where, however, the precise question related to the control of fishing in Buzzard's Bay. The Court said:

"Therefore, if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, could unquestionably be acknowledged by all foreign nations, and her rights to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two

> marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory in which they lie. * * * We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State."

In Louisiana *v.* Mississippi, 202 U. S. 1, 52, relating to a complicated boundary dispute between the states named, Chief Justice Fuller stated the rule as follows, citing McCready *v.* Virginia and Manchester *v.* Massachusetts, viz.:

> "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

Directly in point is the Abby Dodge, 223 U. S. 166. That case involved a federal statute prohibiting a certain type of sponge fishing in the Gulf of Mexico or straits of Florida. The court construed the statute as not having relation to waters within the maritime belt on the ground that fishing there was subject to the control of the state. Directly in point, also, is the case of Skiriotes *v.* Florida, 313 U. S. 69, which dealt with a statute of Florida which forbade the use of diving equipment for the purpose of taking commercial sponges within the maritime belt as defined by Florida law. Holding that the statute was a valid exercise of state power and that there was no conflict with a federal statute limiting the size of sponges which might be taken outside state territorial limits, the court said:

> "According to familiar principles, Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary

legislation otherwise valid is not impaired.—* * * It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation is within the police power of the state.*" (Italics supplied.)

It is worthy of note that, in the case of United States *v.* California, supra, the Supreme Court quoted from the case of Skiriotes *v.* Florida, italicizing the language which we have italicized in the above quotation. All four of the cases which we have cited were cited by the Supreme Court and distinguished in the California case; and there was no suggestion that they were being overruled. The California case held that the state was not the owner of the land under the ocean within the maritime belt, and that it could not claim the oil to be derived therefrom against the claim of the United States; but the established doctrine that the state might exercise police power over the maritime belt and control fishing therein was not questioned in the opinion or affected in any way by the decision. It is clear that very different considerations should govern the decision as to who is to exercise police power over the marginal seas, which can easily be used to interfere with law enforcement on land, or as to who is to control fishing in areas which mean so much to the support of large numbers of people who live near the sea, from those which should govern as to who is to control in the maritime belt the oil to be secured from the land under the ocean, a matter which could easily lead to international controversy. The United States has asserted its paramount authority with respect to oil, but no such authority with respect to fish or fishing; and we see no reason why we should not follow the well settled line of decisions which hold that, in the absence of action by the federal government, the power as to these rests in the several states. If these decisions are to be overruled, the matter is one for the Supreme Court and not for us.

Plaintiffs contend that until the enactment of the fisheries law of 1924 no authority was asserted by the State of South Carolina over the maritime belt and that it was not within

the boundaries of the state as set forth in the statute defining them. Code sec. 2038. An examination of the statute, however, shows that the boundary on the east is given as the Atlantic Ocean; and there is nothing in this inconsistent with the intent to exercise authority over the maritime belt in accordance with what is customary under the law of nations. Even if there were, it is elementary that acts of a legislature do not limit the power of future legislatures; and there is no reason why the legislature of 1924 should not exercise the power which under the law of nations and the decisions of the Supreme Court was unquestionably possessed by the state.

We come, then, to the second point made by plaintiffs, i. e., that the discrimination between residents and non residents in the amount of the license fee exacted is violative of the Privileges and Immunities clause of Article IV of the Constitution and the Equal Protection Clause of the Fourteenth Amendment. It is well settled, however, that these constitutional provisions do not require the state to accord equality of treatment to non residents and residents with respect to the taking of fish or animals ferae naturae, the ownership of which is in the state for the benefit of its inhabitants. Geer *v.* Connecticut, 161 U. S. 519; Ward *v.* Race Horse, 163 U. S. 504; Patsone *v.* Pennsylvania, 232 U. S. 138; Haavik *v.* Alaska Packers' Association, 263 U. S. 510; Locoste *v.* Department of Conservation, 263 U. S. 545; In re Eberle, 98 F. 295; Anderson *v.* Smith, 71 F. 2d 493; Commonwealth *v.* Hilton, 174 Mass. 30, 54 N. E. 362, 45 L. R. A. 475, 478. In the case last cited the rule applicable is stated by the Supreme Judicial Court of Massachusetts as follows:

> "It is now settled that the right of regulation and control of fisheries by the several states is the legislation that secures the benefits of the public right in property to its own inhabitants. The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of inhabitants of any state, rights in common property of the inhabitants of other states. McCready *v.* Virginia, 94 U. S. 319, 24 L. Ed.

248; Wharton *v.* Wise, 153 U. S. 155, 38 L. Ed. 669; Corfield *v.* Coryell, 4 Wash. C. C. 371; Blake *v.* McClung, 172 U. S. 239-249, 43 L. Ed. 432-436."

In the language of Mr. Justice Holmes in Patsome *v.* Pennsylvania, supra, "It is to be remembered that the subject of this whole discussion is wild game (shrimp), which the state may preserve for its own citizens as it pleases." The benefit to be derived from these shrimp, produced in the inland waters of the state and constituting a valuable source of food and income for large numbers of its people, will be largely lost if out of state fishing boats are allowed to prey upon them without let or hindrance. It is unquestionably within the power of the state, as a proper conservation measure, to require of out of state fishermen a license fee so high as to limit their number and to reimburse the people of the state in some measure for the loss sustained by them from the fishing of those who are licensed.

Plaintiffs rely upon Pavel *v.* Richard, 28 F. Supp. 992; but that case is not in point. What was there decided was the special case that a non resident land owner who used his property for raising fur bearing animals was denied the equal protection of the laws by a statute which imposed disproportionate license fees on non resident trappers with whom he had entered into contracts to trap on the property. The general rule that the state may exact higher license fees of non resident hunters and fishermen than of residents and may even exclude non residents from taking fish and game within the state was not considered and no indication was given of any intent to depart from it. If the case could be so interpreted, we should think it not well decided.

There is nothing in the importatipn or interstate commerce points. With the decision as to the power of the state over fishing in the maritime belt, the whole basis of the importation point goes out of the case. As to interstate commerce, the requirement that the shrimp destined for out of state shipment be stamped and properly packed is a proper regulatory provision. It is reasonable relation not only to maintaining the good reputation of produets originating in the State but also to insuring the collection of the one-eighth cent per pound tax, which in the absence of some

such requirement could be easily evaded on shrimp shipped out of the state. It is too well settled to admit of argument that a state may regulate the export of articles in which it has a special property, such as wild game or fish, even if interstate commerce be indirectly affected by the restriction. Geer *v.* Connecticut, supra; Rupert *v.* United States, 8 Cir. 181 F. 87; State *v.* Harrub, 95 Ala. 176, 15 L. R. A. 761, 36 Am. St. Rep. 195; McDonald *v.* Sou. Exp. Co., 134 F. 282; 22 Am. Jur. p. 697; note 32 A. L. R. 336 et *esq.*, and cases there cited. It is equally well settled that a tax on articles produced within a state will be sustained, even though they be intended for interstate shipment, where, as here, the tax does not discriminate against interstate commerce and interstate transportation has not commenced. Coe *v.* Errol, 116 U. S. 517; Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 258; Hope Natural Gas Co. *v.* Hall, 274 U. S. 284; Ohio Oil Co. *v.* Conway, 281 U. S. 146; South Carolina Power Co. *v.* South Carolina Tax Commission, 52 F. 2d 515; s.c. 286 U. S. 525, 60 F. 2d 528; 288 U. S. 188. Since the tax on shrimp here involved was levied without discrimination against interstate commerce, it was valid; and the requirement for packing and stamping was valid as a proper means of preventing tax evasion. It was proper, also, because of the special property of the people of South Carolina in the shrimp taken within the state.

Argument is made that the tax and requirement for fishing and stamping are invalid because applicable to shrimp caught beyond as well as to those caught within the three mile limit. It would be entirely impractical, however, to differentiate between shrimp taken within and without the limit; and those who avail themselves of the privilege of fishing within the limit are properly required to report their entire catch, since otherwise the reasonable provisions of the statute would be unenforceable. See Mirkovich *v.* Milnor, 34 F. Supp. 409; Bayside Fish Flour Co. *v.* Gentry, 297 U. S. 422. In the case last cited, where complaint was made that a California statute applied to fish taken beyond the waters over which the state had jurisdiction, the Court said:

> "Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course,

indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. Silz *v.* Hesterberg, 211 U. S. 31, 39-40."

Plaintiffs place great reliance upon Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1, where the Supreme Court held invalid a state statute which forbade the exportation of shrimp from which head and hulls or shells had not been removed. No such unreasonable interference with interstate commerce is involved in the statute before us. That the case relied on has no application sufficiently appears from the analysis made of it in Bayside Fish Co. *v.* Gentry, supra, where the Court said:

"Appellant places great reliance upon Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1. There an act of the State of Louisiana forbade exportation of shrimp from which the heads and hulls or shells had not been removed. The ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose was to prevent the shrimp from being moved as theretofore from Louisiana to a point in Mississippi, where they were packed or canned and sold in interstate commerce, and thus through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The Louisiana act authorized every part of the shrimp to be shipped and sold in interstate commerce. We held that the state might have retained the shrimp for use and consumption therein; but, having fully permitted shipment and sale outside the state, those taking the shrimp under the authority of the act became entitled to the rights of private ownership and the protection of the commerce clause. It is plain that the decision has no application to the case under review."

For the reasons stated, we think that the injunction applied for should be denied and that the case should be dismissed.

INJUNCTION DENIED AND CASE DISMISSED.

We concur in the foregoing opinion.

/s/ John J. Parker, U. S. Circuit Judge, Fourth Circuit. C. C. Wyche, U. S. District Judge for the Western District of South Carolina, sitting by designation in the Eastern District of South Carolina. George Bell Timmerman, U. S. District Judge for the Eastern and Western Districts of South Carolina.

A True Copy, Attest. Ernest L. Allen, Clerk of U. S. District Court, East. Dist. So. Carolina. (Seal)

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. Davies, S. D. Collins, and The Atlantic Seafood Producers, Inc., a corporation, Plaintiffs,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. Young and J. A. Wilcox, composing the South Carolina State Board of Fisheries, a body corporate, and Alonzo B. Seabrook, the Chief Inspector thereof, Defendants.

Findings of Fact and Conclusions of Law

The Court makes the following findings of fact:

1. The individual plaintiffs are citizens and residents of the State of Georgia and the corporate plaintiff is a corporation created and existing under the laws of the State of Florida. The defendants are citizens and residents of the State of South Carolina composing the Board of Fisheries of that state and charged by law with the enforcement of

the statutes of which plaintiffs complain in this suit. The claim of plaintiffs arises out of and is based upon the Constitution of the United States. The amount in controversy exceeds the sum and value of three thousand dollars.

2. Plaintiffs are engaged in fishing for shrimp within and without the three mile maritime belt of the ocean off the shores of the State of South Carolina and defendants are demanding of them that they pay an annual license fee of $2500.00 for each boat engaged in shrimp fishing within the maritime belt, as prescribed by Code sec. 3379 as amended, that they pay a tax of one-eighth of a cent a pound on all shrimp caught by boats fishing within the maritime belt, even though some of such shrimp may have been caught beyond the maritime belt, as provided as Code 3374, and that they bring all of such shrimp into port and properly pack and stamp them there before shipping them into other states, as provided by Code sec. 3414. Defendants threaten that, if plaintiffs fish for shrimp in the maritime belt without complying with these provisions of the Code, defendants will prosecute them under the penal provisions of the Code, which provide fine and imprisonment for violation of these statutory provisions, and plaintiffs will be unable to continue their business if these statutory penalties are invoked against them.

3. Plaintiffs contend that the provisions of the statutes above mentioned are void as applied to them for that (1) the State of South Carolina is without jurisdiction to exercise statutory authority over fishing within the three mile maritime belt as attempted by said statutes, (2) they are violative of the Privileges and Immunities clause of Article IV of the Constitution and the equal protection clause of the 14th Amendment, in that they discriminate between residents and non residents of the state, and (3) that they impose a burden on interstate commerce and a tax on imports in violation of the Commerce clause of the Constitution. They have submitted the case for final decree.

4. If the contentions of plaintiffs as to the invalidity of the statutes were valid, they would be irreparably damaged by their enforcement and have no adequate remedy at law, in that they would be forced by defendants to pay large

sums by way of taxes for which no means of recovery is provided by law, or to desist from fishing in the maritime belt off the coast of South Carolina, which would result in the loss of business for which no compensation is provided, the tax of the injury in case of some of the plaintiffs being well in excess of $3,000.00.

The Court states its conclusions of law as follows:

1. The statutes involved are not beyond the powers of the legislature to regulate fishing for shrimp in the three mile maritime belt off the shores of South Carolina, in the absence of any legislation by Congress with respect to the subject matter.

2. The Statutes do not violate the Privileges and Immunities clause of the Fourth Article of the Constitution or the Equal Protection clause of the Fourteenth Amendment.

3. The Statutes do not impose an import duty or burden interstate commerce in violation of sections 8 or 10 of Article I of the Constitution.

4. The plaintiffs are not entitled to the injunction prayed and their suit should be dismissed.

This the 12th day of September, 1947.

(S.) JOHN J. PARKER,
U. S. Circuit Judge, Fourth Circuit;

(S.) C. C. WYCHE,
U. S. District Judge for the Western District of South Carolina, sitting by designation in the Eastern district of South Carolina;

(S.) GEORGE BELL TIMMERMAN,
U. S. District Judge for the Eastern and Western Districts of South Carolina.

A true copy, attest.

ERNEST L. ALLEN,
Clerk of U. S. District Court
East. Dist. So. Carolina.

[SEAL.]

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DEGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a corporation; *Plaintiffs*,

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. WILCOX, Composing the South Carolina State Board of Fisheries, a Body Corporate and ALONZO B. SEABROOK, the Chief Inspector thereof, *Defendants.*

Final Decree

This cause coming on to be heard by consent at Spartanburg, South Carolina, on application of plaintiffs for an interlocutory injunction to restrain defendants, officers of the State of South Carolina, from enforcing statutes of that state on the ground that they contravene provisions of the Constitution of the United States; and a court of three judges having been convened pursuant to section 266 of the Judicial Code; and evidence having been taken, and arguments of counsel heard and the cause having been submitted for final decree and the Court having made its findings of fact and conclusions of law which are filed herewith; and the Court being of opinion for the reasons set forth in the written opinion filed herewith, that the application for injunction should be denied and that the suit should be dismissed;

Now, therefore, it is ordered, adjudged and decreed that the application of plaintiffs for an injunction be and the

same is hereby denied, and that the suit be and it is hereby dismissed at the cost of plaintiffs.

This the 12th day of September 1947.

(S.) JOHN J. PARKER,
U. S. Circuit Judge, Fourth Circuit;

(S.) C. C. WYCHE,
U. S. District Judge for the Western District of S. C. sitting by designation in the Eastern District of S. C.;

(S.) GEORGE BELL TIMMERMAN,
U. S. District Judge for the Eastern and Western District of S. C.

A true copy, attest.

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. District So. Carolina

Service of the within Statement of Jurisdiction and exhibits accepted this the 4th day of October, 1947.

(S.) ROBINSON & ROBINSON,
Of Counsel for Defendants.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 10 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. [redacted]

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a Corporation,

Appellants

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG and J. A. WILCOX, composing the South Carolina State Board of Fisheries, a body corporate, and ALONZO B. SEABROOK, the Chief Inspector thereof.

Appellees

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

JOHN J. BOUHAN
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IN THE SUPREME COURT OF THE UNITED STATES

EARL J. TOOMER, ET AL
Appellants

vs.

J. M. WITSELL, ET AL;
Appellees

CASE NO. 415

Brief Of Appellants Opposing Motion To Dismiss Appeal

OCTOBER TERM 1947

Appellants avail themselves under Rule 7 of the Supreme Court of the United States of the privilege of answering the motion to dismiss or affirm filed by appellees.

The point raised in the motion filed by appellees can be summerized for the sake of brevity into three grounds, (a) That there are on substantial grounds for Supreme Court intervention, (b) That appellants have been guilty of infractions of the laws of South Carolina as to bar their right to equitable relief, and (c) That the statutes under attack are constitutional.

It is only fair to point out to this Honorable Court that this is not a case in which the only questions involved are merely whether there is discrimination against a few isolated individuals. If that were the only question, it might be admitted that this question

could be adjudicated in the State Court, and appealed later to the Supreme Court for determination of the constitutionality of the statutes under review.

The record of this case shows that the statutes in question are part of a general scheme to close the waters of South Carolina off its shores to everyone except citizens of South Carolina. For years fishermen of the various states have been enjoying reciprocal rights to fish in the waters off the shores of the various states. Fishing interests have grown and expanded since the decision in the case of **McCready vs. Virginia**, 94 U. S. 391, was rendered years ago. From the business of small inconsequential fishermen, the industry has grown to the point where millions of dollars have been invested in this trade and thousands of persons enjoy employment therefrom. At the present time, due to the shortage of food in all of the world, it is vital to the economy of this country that the widest latitude be allowed to the fishing business.

We believe we can argue with force, that what was right and proper in the days when our national economy was emerging from the million dollar class then to the billions of dollars class now invites a reviewby this Court of the entire picture.

While it is probable that under the earlier decisions of this Court, the rights of the states over fish and game could be viewed in the narrower aspect of states' rights, today changing economic conditions dictate that this country must not be cut up into forty-eight "little worlds," because the security and well-being of the citizens of one state are inexorably interwoven into the pattern of the security of all of the people of the entire United States.

If we are to hold to the narrow and ancient view, that "no one is his brother's keeper," then we invite a country divided against itself. If South Carolina is to be permitted to create a monoply for itself against the rights of the citizens of the other states, such other states, conscious of their consideration for the well-being of their own citizenry, can be expected in short order to pass equally repressive and perhaps more onerous laws than the ones now under consideration. If such a situation were to arise, then the thought of forty-eight little worlds would surely come into being.

Since the McCready case which merely held that a state had the right to protect itself against the invasion of other citizens where the food supply was insufficient to go around, there has been no clear cut decision of this Court as to just where a state can start and where it must stop. Conflicting decisions of state courts, district courts and circuit courts, each trying to harmonize with decisions of other courts, merely have added to the confusion that exists.

It is fundamental law that where a Federal constitutional question is involved and the proper elements of diversity and amount laid, a Federal Court has jurisdiction notwithstanding the extent of concurrent jurisdiction in the State Courts.

Home Tel & Tel Co. vs. Los Angeles
227 U. S. 228

Prentis vs. A. C. L.
211 U. S. 210

Smythe vs. Ames
169 U. S. 466

Wilcox vs. Consolidated Gas Co.
212 U. S. 19

In the case of **Home Tel and Tel Co. vs. Los Angeles, supra,** Mr. Chief Justice White used this strong language, "The enforcement of this doctrine (wait until the state courts have acted, (our language)) would render impossible the performance of the duty imposed on Federal Courts and inevitable paralysis would result."

The purpose of conferring jurisdiction on Federal Courts in diversity of citizenship cases was to make it the duty of the Federal Courts to decide even questions of state law when necessary.

Meredith vs. Winter Haven
320 U. W. 228

Judge Parker, in the opinion under review, used this expression, "If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters . . . there is no provision for payment of the license tax under protect and suit for its recovery, and it is clear that if appellants' contentions as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves."

The learned Circuit Court Judge did not point out the confusion and chaos that would be created in the fishing interests not only along the South Atlantic seaboard, but also along the rest of the coast, the Gulf and Pacific coast waters, as the proposition of substantial federal question and national importance was not before his Court for consideration. The fact that Judge Parker allowed the appeal in this case, however, indicates that he felt that this case was of

sufficient national importance to warrant a review of said case by the highest court of the land.

Appellees further contended before the trial Court that appellants had been guilty of previous criminal violations of the shrimp statutes of South Carolina, and, therefore, because of such conduct had forfeited their rights to relief at the hands of a Court of equity. They continue to urge this proposition on this Honorable Court.

Appellees have never cited any authority in support of this argument, and Judge Parker in his opinion rejected the view that because one or more of these appellants had on a previous occasion violated one of the statutes in dispute, that such a transgression was sufficient to bar them from relief against alleged unconstitutional laws.

The law seems to be well settled that where inequitable conduct is shown, the resulting disqualification extends only to the enforcement of equities which are founded upon the matter or transaction which the conduct involved. * * * The courts apply the maxim, "not by way of punishment for extraneous transgressions, but upon consideration that make for the advancement of right and justice."

Vol. 19 Am. Jur., Sec. 474, page 328

It is well settled that a Federal Court has jurisdiction to enjoin enforcement of an unconstitutional State Statute by state officers clothed with authority to enforce it, especially where it violated the Federal constitution, provided the remedy at law is inadequate, the enforcement will affect the property rights of the appellant, the injunction is necessary

to prevent irreparable injury and the case is reasonably free from doubt.

Cyclopedia of Federal Procedure (2 Ed), Vol. 13 Sec. 6570, and Footnotes, pp. 130-131-132 Callaghan & Co. 1944

Joyner vs. Browning
30 F Supp. 512

Michigan Cent. R. Co. vs. Michigan Public Utilities Comm.
271 F 319

Tyson & Bros. United Theater Ticket Offices vs. Banton
273 U S 418

Pennsylvania vs. West Virginia
262 U S 553

Arrowsmith vs. Voorhies
55 F (2d) 310

Ex Parte Young
209 U S 123

Wells Fargo & Co. vs. Taylor
254 U S 175, 183

Caldwell vs. Sioux Fall Stockyards Co.
242 U S 559

Atlantic Refining Co. vs. Trumbull
43 F (2d) 154

Mutual Orange Distributors vs. Agricultural Pro Rate Commission of Calif.
30 F Supp. 937

Public Service Co. of North Illinois vs. Corboy
250 U S 153

Reagan vs. Farmer's Loan & Trust Co.
154 U S 362

Elmer vs. Wallace
275 F 86

Cotting vs. Kansas City Stockyards
79 F 679

Henderson vs. Thompson
12 F Supp 519

Williams vs. McCartan
212 F 345

Chicago vs. Kendall
266 U S 94

Davis vs. Wallace
257 U S 478

Greene vs. Louisville
244 U. S 499

Keokuk vs. Hamilton
258 U S 122

Appellees argue that there is no irreparable damage in this case sufficient to justify a Federal Court of equity to enjoin the enforcement of a state statute. This specious argument was rejected by Judge Parker. The case appellees cite of **American Federation of Labor vs. Watson 327 U S 582** was cited by appellants to the original three Judge Federal Court. That case was authority only for the proposition that Federal Courts will not inspect a state statute to see if its enforcement infringes the Federal Constitution,

until the state courts have first interpreted its construction, and then if that interpretation puts the statute in conflict with the United States Constitution, Federal Courts will interfere. In the present case there is nothing ambiguous about the South Carolina statutes, except the question as to whether they are honest dyed-in-the-wool conservation measures or whether they, like the wolf in Little Red Riding Hood, are clothed in misleading attire.

A Federal Court of equity functions just like a state court of equity once it assumes jurisdiction, if there are equitable principles involved.

Ewing vs. St. Louis
72 U S 413

Smith vs. Bourbon
127 U S 105

Gordon vs. Washington
295 U S 30

The term irreparable injury is one easy of ascertainment. The difficulty is in dissolving it into its component parts. When is an injury irreparable and when is it not? It has been held that an irreparable injury is one that cannot be repaired or adequately compensated for in money.

26 U S C A, Sec. 1543
Louisville Provision Co. vs. Glenn
18 Fed Supp. 423

Ainsworth vs. Munoskong Hunting and Fishing Club
116 N W 992

Acts tending to destroy a complainants' business,

custom and profits do an irreparable injury.

Millers Ins. vs. Journey Tailors' Union
15 Atl (2nd) 822

Sherman vs. Sterne
117 Atl. 631

Appellees argue that the only threathened result is a multiplicity of crimnal violations and an impairment of private business. If this were all it would still cover almost every gamut of a person's endeavor, but the results that follow from the enforcement of these statutes are much more fundamental. This case does not touch merely on the rights of a few individuals; it touches on the constant struggle of State against individual, State against State, and State against the central government. It means that from these statutes, other statutes more repressive and oppressive in nature will be enacted by the various States against the citizens of other States. It means a paralysis of the fishing industry. It means inflation of the cost of fish, one of the vitals of our food economy, for with restriction there always ensues inflation. It means confusion and dissension among thousands of citizens. It means the loss of employment to thousands of persons.

Appellants realize of course that this Honorable Court cannot consider for review every case that involves merely a determination of Federal violations. However, this case concerns, as we have pointed out, the determination of the measuring rod of States' States' rights, as they affect an industry whose investments run into untold figures, and involves the livelihood of thousands of persons whose entire method of living must be changed if the standard laid

down by the South Carolina statutes are upheld. We feel we are honest in our contention that not only are the issues substantial, but the impact and effect of this decision will be of tremendous import to the national economy. When the courts and even the states are in open conflict with each other, the time has arrived when this Court with its power and prestige should lay down the present day standard by which all men and interests can govern their conduct and way of life.

The right to take a direct appeal to the Supreme Court from the action of a three Judge Federal Court is recognized and permitted in Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380).

See

Paramount Pictures vs. Langer
306 U S 619
83 L. Ed. 1025
59 Sup. Ct. 641

Ex Parte Young
209 U S 123, 155, 162

Pennington vs. Palmer
255 U S 100

Terrence vs. Thompson
253 U S 194, 214

Packard vs. Barton
264 U S 140-143

We do not assume that this Honorable Court expects an exhaustive brief on the question as to the validity of the statutes under attack at this particular phase of the appeal. We wish therefore to briefly set

out the reasons why we feel that the statutes are unconstitutional and merit a ruling by this Court on the issues presented by the appeal.

For many years there were few recriminatory statutes in any of the Southern states on this question of fishing or shrimping privileges. The only restriction was when real conservation required such action. A review of the statutes involved in the instant case show that they never were designed to be merely regulatory or conservation measures. We do not concede that the cost of enforcing these laws entails a greater expense against non-residents than it does against residents, but if it did surely it does not cost the State of South Carolina a hundred times as much to enforce these laws against the one than it does against the other. No where in legal criminology have we found that the citizens of Georgia have ever been that flagrant in their violation of either tax or criminal laws. Another companion statute requires that the fish or shrimp caught must be brought into the ports of South Carolina, not for inspection, in fact the statute singularly omits to even use that phrase as an excuse, but solely for the purpose of imposing a direct tax, regardless whether the shrimp are to be sold in South Carolina or shipped elsewhere. On its face it might appear to non-fishermen that this is not an onerous exaction. However, it must be borne in mind that these articles are highly perishable and that refrigeration, warehouse and packing facilities will be required. This is not a vexatious requirement to fishermen of South Carolina who fish the entire year, for the cost of renting warehouses and installing refrigerating facilities for shrimp which are caught only a

part of the year can be staggered over the entire year, but to fishermen of other states who use the waters off of South Carolina for only a part of the year, the cost becomes proportionately much higher. In addition, fishing vessels of South Carolinans return regularly to home ports, while those of outsiders are required to consume additional time in going into these ports with attendant wear and tear and cost of operation. Another of the statutes under attack provides that an income tax must be paid on all shrimp caught in the waters off the shores of South Carolina, without regard to the place where the individual or corporation is domiciled and without regard to the state in wihch these profits are earned. In other words, this means double taxation in its most onerous form. The record further shows that the cost of the license is such that it not only reduces but destroys any possible profits, and none of the appellants could operate under this law without severe loss on their operations.

Appellees contend that these are conservation measures, but any contention must be based on fact. Calling an onion a rose does not make it a rose. The record shows that the statute places no limitation on the number of permits that can be issued to South Carolinians or on the size of the vessels employed or on the amount of the catch. The results are shown by the record. Since the passage of these laws, more licenses have been issued than ever before. It must be assumed therefore that more shrimp have been caught, but the shrimp have been caught by South Carolinians to whom more licenses have been issued. In fact, the total count of licenses, even with the drastic reduction in licenses to outsiders who come un-

der the $150.00 class (no $2,500.00 licenses have been issued) show that more licenses have been issued than ever before. Another fact which significantly negatives the appellees' contention that this is a bona fide conservation measure is that there is no requirement that the fish caught must be sold in South Carolina and not shipped elsewhere. There is also no limitation on the size of the boats or amount of the catch.

Appellees contend that the State of South Carolina has jurisdiction, for all purposes to at least the three mile limit. We concede that by common usage, states in regulating conduct and police regulations are not limited to their actual boundaries, but we submit, however, where the action sought to be taken is for tax purposes, the right of a state is limited to the boundaries which it establishes and South Carolina had established as its boundaries, the low water mark of the Atlantic Ocean.

Gen. Stat. S. C, Sec. 1
Pinckney vs. The Hungaria
41 F 109 (1889)
Dis. Ct. of S. C.

Assuming that the territorial limits of a state extend three miles seaward from its shore,the nature and extent of its control is a disputed question.

Pinckney vs. The Hungaria
Supra

U. S. vs. California
Advance opinion—Decision rendered by U. S. Sup. Ct. on June 23, 1947

See

Rex vs. Forty-nine Casks of Brandy
3 Hagg. Adm. 289

U. S. vs. Kessler
Baldw. 35

Queen vs. Keyn
L. R. 2 Exch. Div. 81

Cited in **Pinckney vs. The Hungaria,** supra.

Appellees contend that this Court has decided the question of the rights of the states to close the waters off of their shores to non-residents. The only case we can find on this precise question was the case of **Manchester vs. Mass. 139 U. S. 240 (1891)** in which this Court stated,

> "If there be liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, **upon which we express no opinion,** the statute may be considered as an impartial and reasonable regulation of this liberty."

In this case, unlike the case at bar, the purpose of the legislation was not for taxation, but for the preservation of fish.

In the case of Smith vs Maryland 15 L. Ed 269, in which the Supreme Court upheld the right of Maryland to prohibit the taking of oysters from its waters, the court was very careful on page 271 to point out that it was not decided that a State had a right beyond its **low water mark** to close such waters to persons of another State or to violate the provisions of the United States Constitution, the clearest expres-

sion of Judicial disapproval of the statutes under dispute that appellants have been able to find.

There are several other well known cases pertaining to the right of a state to legislate over industry in its waters, among these being **McCready vs. Commonwealth of Virginia,** 94 U. S. 391 (1877); **The Abby Dodge vs. United States,** 223 U. S. 166; and **Skiriotes vs. Florida,** 313 U. S. 69. However all of these cases must be distinguished from the case at bar for the reason that none deal with the subject of running or free-swimming fish or shrimp.

In **McCready vs. Vriginia,** cited supra, the court is upholding a statute prohibiting non-residents from planting oysters in its beds, compared the planting of oysters with the planting of any other crop in the soil of the state.

The **Abby Dodge vs. U. S.,** cited supra, involved the question of whether the State of Florida or the United States had the rights to legislate over the right to take sponges from the bed of the ocean. The Court distinctly states,

> "Here for the reason that the question arising relates only to sponges growing on the soil covered by water, we are not concerned with the subject of running fish and the extent of state and national power over such subject."

Indicative of the fact that the courts have shown no inclination to extend the doctrine of the Abby Dodge case to include other resources than sponges is the case of **U. S. vs. California,** cited supra, in which it was held that the state did not have power to control the oil deposits within the three mile limit off the coast of California. If the Abby Dodge rule gov-

erning sponges was not applicable to oil, which, like sponges, belongs to the soil under the waters, then it would be untenable to apply the Abby Dodge rule to the subject of running fish, or shrimp.

The Skirotes case, cited supra, also involved sponges, on the ground that such a statute was within the police power of the state.

It is clear that the statutes involved in the instant case were purely tax measures and were not passed for the purpose of conservation, and thus are not within the police powers of the state of South Carolina in that they only limit the number of licenses issued to non-residents and require proof of payment of income taxes by non-residents, and thus invite indiscriminate fishing by residents of the state of South Carolina.

One of the statutes under attack undertook to require a tax to be paid on all fish brought into the ports of South Carolina. The statute permits no liberty of action on the part of the fisherman. His act in bringing the fish into South Carolina is not a voluntary act on his part. It is involuntary and required under threat of penal prosecution. No reason other than the desire to tax is set forth in the statute. Not even a pretense of inspection, or health or food regulation is set forth in the statute. We contend that the tax is purely and simply an import tax.

The case of **Gulf Fisheries vs. Darrozet**, 17 F (2d) 1926, involved a statute of Texas which levied a tax on wholesale dealers of one dollar per one thousand pounds of fish brought into port and required that all products be subject to inspection. The court re-

cognized the principle that fish are imports and therefore not subject to taxation, but held the tax valid as an inspection tax.

In commenting on **Gulf Fisheries vs. Darrozet,** cited above, in **Hoovan and Allison vs. Evatt,** 324 U. S. 625 (1945) on page 770 the court says:

> "Chief Justice Marshall's decision (of imports) has received support in cases holding that fish caught in the open seas and brought into this country are imports entitled to constitutional protection although they did not come from a foreign country."
>
> Gulf Fisheries vs. Darrozet
> cited supra
>
> Booth Fisheries vs. Case
> 47 P (2) 834

In the same case, in commenting on **Gulf Fisheries vs. MacInerny,** 276 U. S. 124, the court further states:

> "In that case fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax."

The statutes of South Carolina involved in the case at bar do not provide for inspection of the fish caught. Therefore, the tax can hardly be upheld as an inspection tax in the Gulf Fisheries case. Unlike the facts in the Gulf Fisheries case, the fish here involved were subjected to no processing. Since the facts do not bring this case within the **Gulf Fisheries** de-

cision, the fish must be considered imports and are not taxable.

We contend that the statutes enacted by the State of South Carolina violate the Commerce clause of the United States Constitution and are invalid.

The facts in the case of Foster-Fountain Co. and Sea Food Co.—U—E. J. Haydel, et al, 278 U. S. 1 (1928) are similar to the facts in the case at bar. In the Foster-Fountain Packing case, plaintiff was in the business of shrimping off the coast of Louisiana and shipping the unhulled shrimp to the Sea Food Company in Mississippi where they were canned. An act of Louisiana prohibited the shipping of unhulled shrimp from the state and the right to shrimp or can was restircted to residents of Louisiana. The court held the act invalid and stated,

> "As representative of its people the state might have retained the shrimp for consumption and use thereof . . . but the purpose of the act is not to retain the shrimp for the people of Louisiana; it is to favor canning of meat in Louisiana and violates the commerce clause of the Constitution."

In the case at bar, as has been previously pointed out in this brief, the purpose of the statutes is not to retain the fish and shrimp for consumption and use in South Carolina or to preserve them, but is merely a tax measure which in effect impedes interstate commerce and is thus violative of the commerce clause of the United States Constitution.

We contend that the statutes enacted by the state of South Carolina violate the privilege and immunity clause of the United States Constitution.

The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Art. IV, Sec. 2 (1) U. S. Constitution

Pavel vs. Richards,
28 F Supp. 992 (1928)

Pavel vs. Pattison
24 F Supp. 915

In an action to enjoin enforcement of act of the Legislature of Louisiana which provided resident trapper pay a license of two dollars per year, provided he shall have been a resident for two years, but required that a non-resident trapper pay a tax of two hundred dollars per year plus a cash deposit of three hundred dollars, the court held the statute invalid. "On the merit it seems clear that the effect of this statute is to deny to Pavel and his employees operating under the leases, equal protection of the law in violation of the Federal Constitution." The Court cited,

Ward vs. Maryland
12 Wall. 418

Booth vs. Lloyd et al
33 F 593

U. S. Constitution, Art. 4, Sec. 2

Chalker vs. Birmingham and N. W. R. Co.
249 U S 522

One of the rights secured by United States Constitution, Art. 4, Sec. 2, is that of a citizen of one state to remove to and carry on business in another, without being subjected in property or person to taxes

more onerous than the citizens of the latter state are subject to.

Shaffer vs. Carter
252 U. S. 221

The New York income tax law which allows residents of New York one thousand dollars personal exemption but denies same to non-residents violates the United States Constitution, Art. 4, Sec. 2.

Travis vs. Yale and Towne
252 U. S. 60

The constitutional provision that the citizens of each State shall be entitled to all privileges or immunities of citizens in the several states prevents a State from discriminating against citizens of other states in favor of its own citizens.

Hague vs. CIO
307 U. S. 496

Although concerning Alaska, a territory rather than a state, the case of **Haavik vs. Alaska Packers Association,** 263 U. S. 510 (1924) is analogous to the case at bar. An Act of Alaska imposed upon each resident of Alaska a tax of five dollars for school purposes, and upon each non-resident fisherman a tax of five dollars. The court held the tax valid on the facts which showed that the plaintiff, a non-resident, actually was within the jurisdiction of Alaska for four months of the year and was entitled to enjoy the protection of Alaska, and in paying the five dollar tax was paying the same amount required of all residents of Alaska.

"All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside; No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

Art. XIV, Sec. 1 U. S. Constitution

One of the oldest and best known decisions based on the proposition that one state cannot discriminate against residents of another is the case of **Ward vs. Maryland,** cited supra. Here a statute of Maryland prohibited a non-resident from selling goods without a license unless said goods had been manufactured in Maryland. No license was required of residents. The court held the statute to be a discriminatory tax and repugnant to the Constitution.

The case of **Pavel vs. Richards,** cited supra in this brief, likewise decreed that a higher tax for non-resident trappers than the tax required of resident trappers denied to non-residents the equal protection of the law in violation of the Federal Constitution.

In other cases, some of which have been cited, the courts are careful to determine whether there is discrimination against non-residents of another state.

In Skiriotes vs. Florida, cited supra, the court says,

"Equal protection clause is not violated by a statute, applicable equally to all persons, forbidding use of diving apparatus in taking commercial sponges."

In **Manchester vs. Mass.**, cited supra, we find the language:

> "The statute of Massachusetts . . . was passed for the preservation of the fish and makes no discrimination in favor of citizens of Massachusetts and against citizens of another state."

In **Barbier vs. Connolly**, 113 U. S. 27, is the rule that the state has board police powers if it affects equally all persons similiary situated.

Other cases in which the language of the court is unequivocal in holding that a state cannot discriminate against citizens of other states in favor of its own citizens are:

State of Minn. vs. Barber
10 S. Ct. 954
307 U. S. 496
83 L. Ed. 1423

Georgia Power Co. vs. City of Decatur
281 U. S. 505

Chalker vs. Birmingham
249 U.S. 522

Hague vs. CIO
307 U. S. 496

Hess vs. Pawloski
274 U. S. 352

Sunday Lake Iron Co. vs. Wakefield
274 U. S. 350

Walling vs. People of Mich.
116 U. S. 446

In fairness to the court, we wish to point out one decision in which discrimination against a non-resident in favor of a resident as to the amount of fishing taxes imposed was held valid although this case can be distinguished from the case at bar in that Alaska is a Territory and not a State. This is the case of **Anderson vs. Smith,** 71 F (2d) 493. Here the court upheld a tax of Twenty-five dollars imposed by the Territory of Alaska on non-residents for the use of gill nets. The court stated:

> "Territory of Alaska may fix license fees for fishing in waters of Alaska and in so doing may discriminate between residents and non-residents provided that the license exacted of citizens of the United States non-residents in Alaska **is not so exorbitant as to practically prohibit or so unreasonable as to interfere with rights of fishing granted by Congress."**

In line with this decision is **Freeman vs. Smith,** 44 F (2d) 703 in which an Alaskan statute exacting a tax of one dollar on resident fishermen and two hundred and fifty dollars on non-residents was held invalid.

See also:

Higman Towing Co. vs. Cochran
70 F Supp. 628

In the case at bar the statutes of South Carolina are clearly discriminatory. The amount of taxes required of non-residents of South Carolina are so exorbitant as to practically prohibit fishing, and is thus confiscatory. The tax required of non-resident fishermen is Twenty-five Hundred ($2500.00) Dollars, while the tax imposed on residents of South Carolina is

only Twenty-five ($25.00) Dollars, a difference of one hundred times as much. The law also requires that non-residents must make proof of payment of previous income tax, a discriminatory measure against non-resident fishermen.

The law further imposes unjust and unnecessary requirements on non-resident fishermen in that it requires that all fish caught off the shores of South Carolina must be brought into ports of South Carolina for the purpose not only of taxes but of packing, icing, and shipping, irrespective whether said fish are to be sold to residents of South Carolina or not, and therefore this regulation is certainly not a health measure.

Residents and non-residents engaged in the same occupation or business must be treated substantially alike in the matter of imposing a business license.

O'Connell vs. Kontojohn
179 SO 802

The police power of the state is not unlimited and must not be arbitrarily exercised and must be reasonable.

Feldman vs. Concernati
20 F. Supp. 531

House vs. Mayas
219 U S 270

Near vs. Minnesota
283 U S 697

Able State Bank vs. Weaver
292 U S 766

Property rights cannot be invaded by laws which under guise of police regulations have ulterior motives.

Road District No. 7 vs. Crittenden
28 Fed. (2d) 825

Courts function to determine in each case whether circumstances justify challenged regulations as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.

Paramount Pictures vs. Langer
306 U S 619

The limitation on legislative discretion in making classifications in statutes is that classification should not be arbitrary nor a subterfuge to shield one class and unduly burden another nor unlawfully oppress in its administration.

Frazier vs. State Tax Commission
175 SO 402
110 A L R 1479

People vs. Chapman
301 Mich 584
4 N W(2d) 18

State vs. King
188 A 775

Kelso vs. Bush
88 S W (2d) 594

Welch vs. State of New Hampshire
306 US 79

The principle that, without controlling Congressional action, a state may not regulate interstate com-

merce so as substantially to affect its flow or deprive it of needed uniformity in its regulation, is not to be avoided by simply invoking the convenient apologetics of police power.

So. Pac. Company vs. State of Ariz.
325 U. S. 761 (1945)

The courts have the right to go behind the presumption "the King can do no wrong" and see if the legislation was bona fide or was a guise to discriminate against non-residents, and if the latter to declare such statutes invalid, see,

Ex parte Thornton
12 Fed. 538, 547

In a very recent case decided by the Supreme Court of Georgia, to-wit: **Geele vs. State,** 43 S .E. Rep. (2d) 254, the court held that the basis for statutory classification must relate in some degree to the purpose of the legislation and where the state attempted to require hotels charging a certain rate to install fire escapes without making any reference to hotels that charged a higher rate, that this statute, although called a fire prevention statute, was anything other than such a law, was arbitrary, and had no conceivable relationship to the purpose of protecting guests against fire. The court quotes as its authority the case of **Southern RR vs. Greene,** 216 U. S. 400, and **Asbury Hospital vs. Cass County,** 326 U. S. 207.

CONCLUSION

Appellees place great stress upon the decision of **McCready vs. Virginia,** 94 U. S. 391, contending that based upon this decision the State has jurisdiction to control its fisheries to the exclusion of citizens of other states and its own citizens. The McCready case was concerned with waters within the limits of the state and in that case there was no question of the fact that the statute was a bona fide conservation statute. The case of **Pollards Lessee vs. Hagin,** 3 How. 212, like the McCready case, was merely concerned with inland waterways. In commenting on the Pollard case, Mr. Justice Black in the case of **U. S. vs. California,** cited supra, stated, "We are not persuaded to transplant the Pollard rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the **ocean.**"

Appellees also argue that the Manchester, Louisiana and Abby Dodge cases cited in U. S. vs. **California,** supra, are authorities for the proposition that the state has unlimited right to control fishing.

The Supreme Court answered this question on page 16 of the decision where the court used this expression, "That this question remained undecided is evidenced by **Skiriotes vs. Florida,** 313 U. S. 69, where we had occasion to speak of Florida's power over sponge fishing in its territorial waters. Through Mr. Chief Justice Hughes we said: 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the state statue so far as applied to conduct within the territorial waters of Florida . . . is within the police power of the State."

In other words the Supreme Court in the California case stated that if the states did have powers over fishing it was limited to conduct within the police powers and did not give the state the right to tax indiscriminately.

Others cases cited by appellees are not authorities for the purpose contended by appellants. In the case of Patsone vs. Penn., 232 U. S. 138 the court merely held that the state had a right to deny aliens the right to use guns and therefore could restrict the right to hunt.

Statutes involved in the case at bar are not conservation or preservation measures because they do not limit the supply of fish caught in that they allow residents of South Carolina the right of indiscriminate fishing; neither do they "conserve" the fish caught for consumption in the state of South Carolina, and for these reasons the statutes cannot be labeled conservation or preservation measures coming within the police powers of the state. The statutes do not fall within the classification of "police powers" as an inspection measure because nowhere in the statutes is there a provision for inspection. Appellants contend, therefore, that the measure is not one which can validly be termed conservation measure or police power measure but is merely a tax measure passed to discriminate against non-residents in violation of the United States Constitution.

Appellees fall into the error of contending that since these are allegedly conservation measures, they are therefore ipso facto legal, regardless of how many sections of the Federal Sonstitution they violate. We

are not so certain that this Court would go to that extent, even if the record showed these measures to be conservation measures.

Appellants share the same high regard for the learned Judge who wrote this opinion as this Court does. We fear that the trial Court failed to carefully scan the record in this case and assumed that since the statutes purported to be conservation measures, they were just that, and therefore the old rule of self preservation should first be applied. The facts however, negative such a view. The record shows that there were more shrimp hauled out of the waters of South Carolina before the enactment of this law than before, and that its only effect has been to create a monoply for the shrimping interests of South Carolina.

Assuming that this Court might hold to the view of appellees that the states possess this unbelievable right, we come to the final proposition as to how far can a state go to discriminate unreasonably and unjustly. This great nation has the inherent and unquestioned power to bar aliens and undesirables from our shores, but once this country removes the barrier ever so slight and admits them, can this nation then deny to them, the use of the courts, the right to labor, or own property, to trade or enjoy the four freedoms. By the same analogy, granting that the state had the right to determine when its doors should be closed for reasons best known to itself, could it after having opened these doors proceed to discriminate unjustly and unreasonably against the citizens of other states, or is it then compelled to obey the laws of the land

in the same degree that this country expects other citizens to act.

We submit that not only has this Court jurisdiction to entertain the appeal, but that the issues and the facts are of such vital juridical and national importance as to require the determination of the same on its merits.

Respectfully submitted,

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STATEMENT AS TO THE FACTS OF THE CASE:

Appellants, residents of Georgia and Florida, engaged in the business of fishing and shrimping off of the coastal waters of the Southeastern states, brought a bill in equity in the District Court of the United States for the Eastern District of South Carolina, Charleston Division, against J. M. Witsell, et al, as defendants, which said defendants compose the South Carolina State Board of Fisheries, and asked said Court for a temporary restraining order and an interlocutory and permanent injunction restraining said defendants from enforcing against appellants certain South Carolina statutes which provide that the coastal waters beyond the low water mark within the three-mile maritime belt shall be a common for the people of the State of South Carolina for the taking of fish and imposing an annual license fee of Twenty-five ($25.00) Dollars on boats engaged in shrimp fishing therein if owned by residents of South Carolina and a license fee of Twenty-five hundred ($2,500.-00) Dollars on boats owned by non-residents and further limiting the issuance of non-resident licenses to one hundred (100). Said statutes further impose a tax of one-eighth (1/8) cent per pound on green shrimp taken or shipped from said state and require all boats licensed to trawl for shrimp in the coastal waters within three miles of the ordinary low water mark of the coast of South Carolina to unload their catch of shrimp and pack and properly stamp the same within the State of South Carolina before shipping or transporting it to another state or the waters thereof and impose punishment for the violation thereof. (Record page 1-18, 19-23).

The facts of said case as evidenced by the record show that there is a diversity of citizenship between the parties, appellants and appellees, that the amount involved is in excess of Three thousand ($3,000.00) Dollars, that there is no adequate remedy at law by which the appellants may obtain relief, that serious property rights are involved, that irreparable damage is threatened to said appellants, that the Constitutionality of statutes forming the basis of the action taken by the appellees is involved, and that substantial issues of Federal and national importance are concerned. The record further discloses that appellants would be compelled, if they desire to fish in South Carolina waters, not only to pay a Twenty-five hundred ($2,500,00) dollar license fee per year as contrasted with a twenty-five ($25.00) dollar license fee by residents of South Carolina, but in addition would be compelled to pay an income tax on all profits made from fish caught in the waters of South Carolina, although said fish were sold in Georgia or Florida and on which profits income taxes were paid to said respective states, and further appellants would be required to bring said fish into the ports of South Carolina for the purpose of being unloaded, stamped packed and reloaded upon their vessels and as a result would have to rent warehouses and refrigeration facilities in said state of South Carolina. Appellants in addition thereto would be compelled to pay a poundage tax on the shrimp caught.

The facts disclose that said statutes, individually and as a composite whole, are prohibitive and confiscatory and make it impossible for the appellants to operate profitably in the waters off the shores of South Carolina. As a result of said statutes, more

licenses have been issued to residents of South Carolina than ever before, negativing the idea that said measures are conservation measures. The attention of the Court is called to the stipulations agreed to between the parties, particularly stipulation numbers 7, 10, 13, 14 and 16 made part of the record which establishes the undisputed facts as argued by appellants in this brief. (Record page 29-30).

The bill in equity filed by appellants attacked the validity and constitutionality of the Statutes enumerated in the record and also the jurisdiction of the state of South Carolina over the ocean waters within the three-mile maritime belt from the low water mark of the coast of the state of South Carolina.

(Record page 29-31, 32-49).

On August 18, 1947 a hearing on the temporary restraining order was held before a District Judge, the Honorable C. C. Wyche, who set the hearing on the prayer for an interlocutory injunction for a date certain and under and by virtue of Section 266 of the Judicial Code (28 U.S.C.A. 380), a statutory court, consisting of one Circuit Court Judge, namely, Honorable John J. Parker and two District Court Judges, namely, Honorable C. C. Wyche and Honorable George Bell Timmerman, was specially convoked and after a final hearing thereof, held on August 25, 1947, by an opinion rendered, which opinion is made a part of the record in said case and hereinafter referred to in this brief, said three judge court entered a fin. judgment and decree which dismissed appellants' complaint and denied the application for an interlocutory and permanent injunction. Said final order, judgment and decree was entered and appeared of record on September 13, 1947.

The case was heard and determined and the final judgment and decree was predicated upon the issues raised by appellants' complaint and appellees' return and answer (Record page 24-28) which were in substance as follows:

(1) Whether a Federal Court of Equity had jurisdiction to entertain the application for injunction,

(2) Whether the appellants were entitled to relief in equity because of having violated an equitable maxim of not coming into court with clean hands,

(3) Whether the statutes attacked were unconstitutional, and,

(4) Whether appellants were entitled to the relief which they sought or whether the proceedings should be remanded to a State Court.

The Court in its decree held that the appellants had a right to come into a Federal Court of Equity, that they had not violated any equitable maxim, and that the case did not have to be remanded back to a State Court; however, on the general basic proposition that the Statutes attacked were unconstitutional, the Court held that the Statutes were not unconstitutional and that the appellants because of said fact were not entitled to the relief sought. (Record page 49-60, 61-62).

From said adverse ruling of said Court and in conformity with the provisions of Section 266 of the Judicial Code of the United States, an appeal to this Honorable Court was made and allowed by the presiding Judge of said special three-Judge Court, namely, the Honorable John J. Parker, said petition for appeal having been presented and filed October 3, 1947,

All necessary pre-requisites, such as assignment of error, statement as to the jurisdiction, service, etc., were duly made in accordance with the rules of this Honorable Court. (Record page 63-68).

Subsequently a motion to affirm the judgment of the lower Court and to dismiss the appeal of the appellants was filed by the appellees on the grounds

(a) That the Supreme Court had no jurisdiction in the premises,

(b) That appellants had been guilty of such infractions as to bar their right to equitable relief,

(c) That the Statutes of South Carolina were constitutional,

Appellants filed, within the time provided by law, a brief in support of their legal position and this Honorable Court did, on the 24th day of November, 1947, note probable jurisdiction (Record page 69.) so that said case is now before this Court for argument and determination.

The basis upon which appellants feel that the Supreme Court of the United States has jurisdiction to entertain a direct appeal from the specially convened three Judge District Court is set out in the statement as to jurisdiction heretofore filed in said case. The statutory provision believed to sustain jurisdiction is found in Section 266 of the Judicial Code (28 U.S.C.A. Sec. 380) which concludes as follows:

"... and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

GENERAL STATEMENT OF ISSUES INVOLVED.

I. JURISDICTION.

Said case was properly brought in the United States District Court and is properly before the United States Supreme Court for review because there is a diversity of citizenship, the amount involved is over Three Thousand ($3,000,00) Dollars, there is no adequate remedy at law, the damages are irreparable, the statutes concerned violate the Constitution of the United States, and the questions involved are substantial and of national importance.

The right to appeal to the Supreme Court is provided for by Section 266 of the Judicial Code which concludes with the following words,

> "... and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

II. CONSTITUTIONALITY OF STATUTES INVOLVED.

The appellants contend that certain statutes of the State of South Carolina are void and unconstitutional as applied to them upon the following grounds:

1: That the State of South Carolina has no jurisdiction of the coastal waters or ocean within the three-mile maritime belt lying seaward off the ordinary low water mark of the coast of South Carolina.

2: That the said Statutes as applied to appellants make an arbitrary and unreasonable discrimination

between residents and non-residents of the State of South Carolina in violation of the Privileges and Immunities clause (Art. IV, sec. 2 (1)), and the Commerce clause (Art. I sec, 8 (3)), of the United States Constitution, and in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution.

3: That the Statutes impose a tax on imports and a burden on interstate commerce in violation of Article I, Sections 8 and 10 of the United States Constitution.

4: That said Statutes are not bona fide conservation measures, but were passed and operate to illegally deny citizens of other states rights granted to residents of South Carolina, and designed to perpetuate and create a monopoly to the citizens of South Carolina in the shrimp industry.

The Statutes of the State of South Carolina above referred to provide in substance as follows:

Section 3300 of the Code of South Carolina provides that all waters in the maritime belt within three miles seaward of the low water mark of the coast of the State of South Carolina shall be a "common for the people of the State for taking of fish" and requires that licenses be secured from the State of South Caro- of South Carolina for that purpose.

Section 3379 of the Code of South Carolina requires all fishing boats owned by residents of South Carolina to obtain an annual license for the sum of Twenty-five ($25.00) Dollars and all fishing boats

owned by non-residents of said state to secure an annual license for the sum of Twenty-five Hundred ($2500.00) Dollars, provided that licenses required of non-residents who have operated their boats in South Carolina during each of three preceding years may be secured by said non-residents for One Hundred Fifty ($150.00) Dollars, and further limiting the number of non-resident fishing licenses to one hundred.

Section 3374 of the Code of South Carolina imposes a tax of one-eighth (1/8) cent per pound on all green shrimp taken in the ocean waters within the three mile maritime belt of said State as hereinbefore set forth.

Section 3414 of the Code of South Carolina requires all boats licensed to trawl for shrimp in the maritime belt or ocean waters within three miles of the low water mark of the coast thereof to bring their catch of shrimp and fish into the ports of South Carolina where they shall be unloaded, packed and properly stamped before shipping or transporting to another State or the waters thereof.

Section 3407 of the Code of South Carolina provides Penalties of One Thousand ($1,000.00) Dollars fine and imprisonment of not more than six months for violation of the foregoing statutes.

(Record page 11-17, 22).

SPECIFICATION OF ERRORS ASSIGNED

1: That the State of South Carolina did not have the authority to enact the various statutes under attack in this case because it lacked the jurisdiction to enact tax laws beyond the low water mark of the Atlantic Ocean bounding its border on the East, as set out in Section 2038 of the Civil Code of 1942 of the State of South Carolina. (Record page 66).

2: That the State of South Carolina did not have the legal right to enact the statute set out in said petition which required a tax to be paid on all shrimp caught on the open sea and which required that said shrimp be brought into the ports of South Carolina for the purposes of taxation, which statute is in violation of the power of a state to tax imports. (Record page 66).

3: That the State of South Carolina did not have the legal right to enact the statute set out in the petition known as Section 3414 of the Civil Code of the State of South Carolina 1942 which required that shrimp caught off the coast of South Carolina be brought into the ports of that State for packing and a payment of a tax on the shrimp to be shipped beyond the limits of the State, said statute being violative of the equal protection, due process, privilege and immunities and an undue burden on commerce, and was not a valid and bona fide health, conservation or police regulation. (Record page 66).

4: That the State of South Carolina did not have the legal right to enact the statute set out in the petition and known as amended act of section 3379 of the 1942 Civil Code of South Carolina, which statute limited the number of licenses which could be issued to

non-residents while permitting an unlimited number to residents and which required that non-residents pay a license of Twenty-five hundred ($2500.00) dollars per year while residents only were required to pay Twenty-five ($25.00) Dollars per year, and also required as a preliminary requisite that non-residents pay income tax for preceding years to South Carolina, said statute being violative of the equal protection, due process, privilege and immunities, and commerce clauses of the Constitution of the United States. (Record page 66).

5: That the statutes set out in appellants' petition were all part of a general plan or scheme to discriminate unfairly and unjustly against non-residents, and said various acts were so onerous that said non-residents could not shrimp profitably in the waters off South Carolina, and said statutes were neither bona fide health, regulatory or conservation measures, and being violative of the equal protection, due process, privilege and immunities, and the commerce clauses.

6: That appellants had the right to file said bill in equity in a Federal Court of equity, and under the pleadings, evidence and the law were entitled to the relief sought. (Record page 66).

7: That the three Judge Federal Court erred in refusing to render a decree in favor of the appellants, the evidence and the law demanding a finding in their favor. (Record page 66).

8: That the Supreme Court has jurisdiction to entertain said appeal, and that the facts are of such national importance, and the law involved of such a substantial nature, that said Court should hear said appeal, and subsequently thereafter render decision in favor of appellants on the merits of said appeal.

ARGUMENT AND AUTHORITIES

I. JURISDICTION

It is fundamental law that where a Federal constitutional question is involved and the proper elements of diversity and amount laid, a Federal Court has jurisdiction notwithstanding the extent of concurrent jurisdiction in the State Courts.

Home Tel. & Tel. Co. vs. Los Angeles
227 U. S. 278

Prentis vs. A. C. L.
211 U. S. 210

Smyth vs. Ames
169 U. S. 466

Wilcox vs. Consolidated Gas Co.
212 U. S. 19

In the case of **Home Tel. and Tel. Co. vs. Los Angeles, supra,** Mr. Chief Justice White used this strong language, "The enforcement of this doctrine (wait until the state courts have acted) would render impossible the performance of the duty imposed on Federal Courts and inevitable paralysis would result."

The purpose of conferring jurisdiction on Federal Courts in diversity of citizenship cases was to make it the duty of the Federal Courts to decide even questions of state law when necessary.

Meredith vs. Winter Haven
319 U. S. 736

Appellees contended before the trial Court that appellants had been guilty of previous criminal violations of the shrimp statutes of South Carolina, and,

therefore, because of such conduct had forfeited their rights to relief at the hands of a Court of equity. They continue to argue this proposition in this Honorable Court.

Appellees have never cited any authority in support of this argument, and Judge Parker in his opinion rejected the view that because one or more of these appellants had on a previous occasion violated one of the statutes in dispute, that such a transgression was sufficient to bar them from relief against alleged unconstitutional laws. (Record page 52).

The law seems to be well settled that where inequitable conduct is shown, the resulting disqualification extends only to the enforcement of equities which are founded upon the matter or transaction which the conduct involved. The courts apply the maxim, "not by way of punishment for extraneous transgressions, but upon consideration that make for the advancement of right and justice."

Am. Jur. Vol. 19, Sec. 474, p. 328

It is well settled that a Federal Court has jurisdiction to enjoin enforcement of an unconstitutional state statute by state officers clothed with authority to enforce it, especially where it violated the Federal Constitution, provided the remedy at law is inadequate, the enforcement will affect the property rights of the appellant, the injunction is necessary to prevent irreparable injury and the case is reasonably free from doubt.

Caldwell vs. Sioux Fall Stockyards Co.
242 U. S. 559

Chicago vs. Kendall
266 U. S. 94

Davis vs. Wallace
257 U. S. 478

Ex Parte Young
209 U. S. 123

Greene vs. Louisville
244 U. S. 499

Keokuk and Hamilton Bridge Co. vs Salm,
258 U. S. 122

Pennsylvania vs. West Virginia
262 U. S. 553

Public Service Co. of N. Illinois vs. Corboy
250 U. S. 153

Reagan vs. Farmer's Loan & Trust Co.
154 U. S. 362

Tyson & Bros. United Theater Ticket Offices vs. Banton
273 U. S. 418

Wells Fargo & Co. vs. Taylor
254 U. S. 175, 183

Arrowsmith vs. Voorhies
55 F. (2d) 310

Atlantic Refining Co. vs. Trumbull
43 F (2d) 154

Cotting vs. Kansas City Stockyards
79 F 679

Elmer vs. Wallace
275 F 86

Michigan Cent. R. Co. vs. Michigan Public Utilities Comm.
271 F 819

Williams vs. McCartan
212 F 345

Henderson vs. Thompson
12 F Supp 519

Joyner vs. Browning
30 F Supp 512

Mutual Orange Distributors vs. Agricultural Pro Rate Commission of Calif.
30 F Supp 937

Cyclopedia of Federal Procedure (2),
Vol. 13, Sec. 6570, and Footnotes, pp. 130-131-132-Callaghan & Co., 1944

Appellees argue that there is no irreparable damage in this case sufficient to justify a Federal Court of equity to enjoin the enforcement of a state statute. This specious argument was rejected by Judge Parker. The case appellees cite of **American Federation of Labor vs. Watson**, 327 U. S. 582 was cited by appellants to the original three Judge Federal Court. That case was authority only for the proposition that Federal Courts will not inspect a state statute to see if its enforcement infringes the Federal Constitution, until the state courts have first interpreted its construction, and then if that interpretation puts the statute in conflict with the United States Constitution, Federal Courts will interfere. In the present case there is nothing ambiguous about the South Carolina statutes, except the question as to whether they are honest dyed-in-the-wool conservation measures or whether they, like the wolf in Little Red Riding Hood, are clothed in mis-leading attire.

Judge Parker, in the opinion under review, used

this expression, "If they should not pay the license, the criminal penalties which they would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters . . . there is no provision for payment of the license tax under protest and suit for its recovery, and it is clear that if appellants' contentions as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves."

(Record page 51).

A Federal Court of equity functions just like a state court of equity once it assumes jurisdiction, if there are equitable principles involved.

Ewing vs. St. Louis
72 U. S. 413

Smith vs. Bourbon County
127 U. S. 105

Gordon vs. Washington
295 U. S. 30

The term "irreparable injury" is one easy of ascertainment. The difficulty is in dissolving it into its component parts. When is an injury irreparable and when is it not? It has been held that an irreparable injury is one that cannot be repaired or adequately compensated for in money.

26 U. S. C. A., Sec. 1543

Louisville Provision Co. vs. Glenn
18 F Supp 423

Ainsworth vs. Munoskong Hunting and Fishing Club
116 N. W. 992

Acts tending to destroy a complainant's business, custom and profits do an irreparable injury.

Millers Ins. vs. Journey Tailors' Union
15 Atl. (2d) 822

Scherman vs. Sterne
117 Atl. 631

Appellees argue that the only threatened result is a multiplicity of criminal violations and an impairment of private business. If this were all it would still cover almost every gamut of a person's endeavor, but the results that follow from the enforcement of these statutes are much more fundamental. This case does not touch merely on the rights of a few individuals; it touches on the constant struggle of State against individual, State against State, and State against the central government. It means that from these statutes, other statutes more repressive and oppressive in nature will be enacted by the various states against the citizens of other states. It means a paralysis of the fishing industry. It means inflation of the cost of fish, one of the vitals of our food economy, for with restriction there always ensues inflation. It means confusion and dissension among thousands of citizens. It means the loss of employment to thousands of persons.

The Court below delivered a written opinion, a large part of which is devoted to the discussion of the jurisdiction of the Court over the subject matter and whether or not injunctive relief was appropriate in the instant case. In this connection the Court said:

> "It is clear, however, that t h e r e is diversity of citizenship and that the cause of action asserted by the plaintiffs arises under

the Constitution of the United States. Plaintiffs cannot bring themselves within a $150.00 license provision and as to one or more of them, the license fees which they are required to pay under the act will amount to $5,000.00 or more. If they should not pay the license the criminal penalties which would incur by unlicensed trawling would make it impossible for them to continue trawling in South Carolina waters and this would involve loss of business for a number of the plaintiffs in excess of $3,000.00 annually. There is no provision for payment of the license tax under protest and suit for its recovery; and it is clear that if plaintiffs' contention as to the invalidity of the statutes is correct, they are threatened with irreparable injury and have no adequate remedy at law of which they may avail themselves." (Record page 51).

The right to take a direct appeal to the Supreme Court from the action of a three Judge Federal Court is recognized and permitted in Section 266 of the Judicial Code (28 U.S.C.A., Sec. 380).

See:

Paramount Pictures vs. Langer
306 U. S. 619

Ex Parte Young
209 U. S. 123, 162

Kennington vs. Palmer
255 U. S. 100

Terrace vs. Thompson
263 U. S. 197-214

Packard vs. Banton
264 U. S. 140-143

II. THE STATUTES INVOLVED ARE UNCONSTITUTIONAL AND ILLEGAL

A. The Statutes Are Not Within The Jurisdiction of The State of South Carolina.

1. The State of South Carolina has no jurisdiction of the coastal waters beyond the low water mark.

Appellees contend that the State of South Carolina has jurisdiction for all purposes to at least the three mile limit. Appellants concede that by common usage, states in regulating conduct and police regulations are not limited to their actual boundaries, but we submit, however, that where the action sought to be taken is for tax purposes, the right of a State is limited to the boundaries which it establishes, and South Carolina had established as its boundaries, the low water mark of the Atlantic Ocean.

Gen. Stat. S. C. Sec. 1

Pinckney vs. The Hungaria
41 F 109 (1889)
Dist. Ct. of S. C.

Assuming that the territorial limits of a State extend three miles seaward from its shores, the nature and extent of its control is a disputed question.

Pinckney vs. The Hungaria,
supra

U. S. vs. California
Advance opinion—Decision rendered by U. S. Supreme Court on June 23, 1947

See:

Rex vs. Forty-nine Casks of Brandy
3 Hagg. Adm. 289

U. S. vs. Kessler
Baldw. 35

Queen vs. Keyn
L. S. 2 Exch. Div. 81

Appellees contend that this Court has decided the question of the rights of states to close the waters off their shores to non-residents. The only case that we can find on this precise question is the case of **Manchester vs. Mass.**, 139 U. S. 240 (1891) in which this Court stated,

> "If there be liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or citizens of the United States, **upon which we express no opinion**, the statute may be considered as an impartial and reasonable regulation of this liberty."

In this case, unlike the case at bar, the purpose of the legislation was not for taxation, but for the preservation of fish, and in the Manchester case the action complained of took place in a bay and not in the waters off of the coast of the state.

In the case of **Smith vs. Maryland**, 59 U. S. 71, in which the Supreme Court upheld the right of Maryland to prohibit the taking of oysters from its waters, the Court was very careful to point out that it was not decided that a State had a right **beyond its low water mark** to close such waters to persons of another state or to violate the provisions of the United States Constitution, the clearest expression of Judicial disapproval of the Statutes under dispute that appellants have been able to find.

There are several other well known cases pertaining to the right of a State to legislate over industry in its waters, among these being **McCready vs. Commonwealth of Virginia**, 94 U. S. 391 (1877); **The Abby Dodge vs. United States**, 223 U. S. 166; and **Skiriotes vs. Florida**, 313 U. S. 69. However, all of these cases must be distinguished from the case at bar for the reason that none deal with the subject of running or free-swimming fish or shrimp.

In **McCready vs. Virginia**, cited supra, the Court in upholding a statute prohibiting non-residents from planting oysters in its beds, compared the planting of oysters with the planting of any other crop in the soil of the state.

The **Abby Dodge vs. U. S.**, cited supra, involved the question of whether the state of Florida or the United States had the right to take sponges from the bed of the ocean. The Court distinctly stated,

> "Here for the reason that the question arising relates only to sponges growing on the soil covered by water, we are not concerned with the subject of running fish and the extent of state and national power over such subject."

Indicative of the fact that the courts have shown no inclination to extend the doctrine of the **Abby Dodge** case to include other resources than sponges is the case of **U. S. vs. California**, cited supra, in which it was held that the state did not have power to control the oil deposits within the three mile limit off the coast of California. If the **Abby Dodge** rule governing sponges was not applicable to oil, which, like sponges, belongs to the soil under the waters, then it would

be untenable to apply the **Abby Dodge** rule to the subject of running fish or shrimp.

The **Skiriotes** case, cited supra, also involved sponges, and was decided on the ground that the statute there involved was within the police power of the State.

2. The statutes involved are not within the Police Power of the state either for the purpose of taxation or as "bona fide" conservation measures.

It is clear that the statutes involved in the instant case were purely tax measures and were not passed for the purpose of conservation. The record does not disclose the necessity for conservation, and thus the statutes are not within the police powers of the state of South Carolina. The statutes only limit the number of licenses that can be issued to non-residents, but place no limitation on the number issued to residents. The statutes require proof of payment of income taxes by non-residents and require the payment of a tax per pound on shrimp packed and shipped beyond the limits of the State, but do not limit the size or amount of shrimp or fish caught. The result is not to preserve shrimp or conserve them for consumption in South Carolina but to invite indiscriminate shrimping by residents of the state of South Carolina while placing prohibitive and onerous restrictions on the non-residents who seek to shrimp in the waters off the state of South Carolina.

Appellees contend that these are conservation measures, but any contention must be based on fact. Calling an onion a rose does not make it a rose. The record shows that the statute places no limitation on the number of permits that can be issued to South

Carolinians or on the size of the vessels employed or on the amount of the catch. The results are shown by the record. Since the passage of these laws, more licenses have been issued than ever before. It must be assumed therefore that more shrimp have been caught, but the shrimp have been caught by South Carolinians to whom more licenses have been issued. In fact, the total count of licenses, even with the drastic reduction in licenses to outsiders who come under the $150.00 class (no $2,500.00 licenses have been issued) shows that more licenses have been issued than ever before. Another fact which significantly negatives the appellees' contention that this is a bona fide conservation measure is that there is no requirement that the fish caught must be sold in South Carolina and not shipped elsewhere.

Appellees urge that since in one of the preambles to one of the statutes in question some reference is made to conservation, that therefore this establishes that the measures were conservation measures. Presumptions as to the purpose of an act are not indulged in by the Courts to the extent of over-ruling the rule of reason. In **Bayside Fish Flour Company vs. Gentry,** 297 U. S. 422, 80 L. Ed. 772, this court held that a state statute restricting the processing of fish, **the plain purpose of which is simply to conserve,** is valid, but we submit that where the plain purpose of the statute is not to conserve but to monopolize the shrimp industry, this court is not compelled to stop at the label. Just as chemistry can be dissolved into its component parts, so can the law be analyzed and examined both as to cause and effect.

There is an old expression, used quite often, "The proof of the pudding is in the eating." Regardless

what label the appellees use, the fact remains, that as a result of the Statute more licenses were issued than ever before.

The police power of the State is not unlimited and must not be arbitrarily exercised and must be reasonable.

Feldman vs. Cincinnati
20 F Supp 531

House vs. Mayas
219 U. S. 270

Near vs. Minnesota
283 U. S. 697

Abie State Bank vs. Weaver
282 U. S. 766

Property rights cannot be invaded by laws which under guise of police regulations have ulterior motives.

Road District No. 7 vs. Crittenden
28 F (2d) 825

The courts have the right to go behind the presumption "the King can do no wrong" and see if the legislation was bona fide or was a guise to discriminate against non-residents, and if the latter to declare such statutes invalid, see,

Ex parte Thornton
12 F. 538, 547

In a very recent case decided by the Supreme Court of Georgia, to-wit: **Geele vs. State, 43 S. E.** (2d) 254, (1947), the court held that the basis for statutory classification must relate in some degree

to the purpose of the legislation and where the state attempted to require hotels charging a certain rate to install fire escapes without making any reference to hotels that charged a higher rate, that this statute, although called a fire prevention statute, was anything other than such a law, was arbitrary, and had no conceivable relationship to the purpose of protecting guests against fire. The court quotes as its authority the case of **Southern RR vs. Greene,** 216 U. S. 400, and **Asbury Hospital vs. Cass County,** 326 U. S. 207.

For many years there were few recriminatory statutes in any of the Southern states on the question of fishing or shrimping privileges. The only restriction was when real conservation required such action. A review of the statutes in the instant case show that they never were designed to be merely regulatory or conservation measures. We do not concede that the cost of enforcing these laws entails a greater expense against non-residents that it does against residents, but if it did, surely it does not cost the state of South Carolina a hundred times as much to enforce these laws against the one than it does against the other. Nowhere in legal criminology have we found that the citizens of Georgia have ever been that flagrant in their violation of either tax or criminal laws.

The Court below in rendering its opinion on the merits of the controversy as to the validity of the statutes assumed a premise which the record does not support. The lower Court took the position that the measures were conservation measures and, therefore, that the state of South Carolina had a right to pass them, irrespective whether they violated certain sec-

tions of the Constitution pointed out in the petition or not. (Record page 56-57.) A review of the record and of the statutes themselves shows that they were conceived with only one view in mind, and that was to create a monoply for the benefit of certain South Carolinians by prohibiting citizens of other states from fishing in the waters off the shores of South Carolina, and that all of these measures had this patent and ulterior purpose.

B. THE STATUTES VIOLATE THE IMPORT DUTY CLAUSE OF THE UNITED STATES CONSTITUTION.

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: . . . "

U. S. Constitution, Art. I, Sec. 10 (2)

One of the Statutes under attack requires a tax to be paid on all fish brought into the ports of South Carolina. The statute permits no liberty of action on the part of the fisherman. His act in bringing the fish into South Carolina is not a voluntary act on his part. It is involuntary and required under threat of penal prosecution. No reason other than the desire to tax is set forth in the statute. Not even a pretense of inspection, for health or food regulation is set forth in the statute. We contend that the tax is purely and simply an import tax.

The case of Gulf Fisheries vs. Dorret, 17 F (2d) 374 (1926), involved a statute of Texas which levied a tax on wholesale dealers of one dollar per one thousand pounds of fish brought into port and required that

all products be subject to inspection. The Court recognized the principle that fish are imports and therefore not subject to taxation, but held the tax valid as an inspection tax.

In commenting on **Gulf Fisheries vs. Darrozet,** cited above, in **Hooven and Allison vs. Evatt,** 324 U. S. 625 (1945) on page 770, the Court says,

> "Chief Justice Marshall's decision (of imports) has received support in cases holding that fish caught in the open seas and brought into this country are imports entitled to constitutional protection although they did not come from a foreign country."
>
> Gulf Fisheries vs. Darrozet
> Cited supra
>
> Booth Fisheries vs. Case
> 47 P (2d) 834

In the same case, in commenting on **Gulf Fisheries vs. MacInerney,** 276 U. S. 124, the Court further states:

> "In that case fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax."

In line with the logic of the reasoning employed in the **Gulf Fisheries** case was the ruling made in the case of **State vs. Jutstrom Fish Company, 39 P. (2d) 355, 149 Oregon 362 (1935)** where the court held that fish caught beyond the three mile limit if constituting imports lost their character as such and became subject to state poundage tax on wholesale fish dealer

after being purchased by dealer and **beheaded and reiced for shipment to other states.**

The Court's attention is called to the fact that in the statutes under review the poundage tax is levied on all holders of licenses of the state of South Carolina, and while it limits the tax to green shrimp caught within the three mile limit, it is impossible to ascertain once a vessel docks which shrimp had been caught within the three mile limit and which were caught on the high seas beyond this zone.

The law is clear that when the Federal Constitution was adopted the people gave to the federal government exclusive power over the external affairs of the nation, including as a part thereof, the power to levy and collect imports and duties on imports from foreign countries. These powers have been recognized and maintained by the courts, and a state not only has no right to levy and collect import duties but it cannot interfere with, obstruct nor question the policy of any laws which Congress may constitutionally enact on these subjects.

Board of Trustees of the Univ. of Ill. vs. U. S.
289 U. S. 48

While it is true that the above decision discusses the prohibition of the right to tax imports from foreign countries, the result would be the same where fish or shrimp are concerned, as free swimming shrimp or fish, ferae naturae connot be classified as the property of any state, individual or nation. See: In re: Dunkly, 64 F. Supp. 10.

The statutes of South Carolina involved in the case at bar do not provide for inspection of the fish

caught. Therefore the tax can hardly be upheld as an inspection tax as in the **Gulf Fisheries** case. Unlike the facts in that case, the shrimp in the present case were subjected to no processing, nor had they been changed in character as set out by the facts in the **Justrom** case. Since the facts do not bring this case within the exception laid down in those cases, the fish must be considered as imports, and are therefore not taxable.

In this connection, it would not be impertinent to point out that the trial Court made no effort to explain away the **Gulf Fisheries** decision. It contented itself merely with the statement that "the State having the power over fishing in the maritime belt, the whole basis of the importation point goes out of the case." (Record page 57).

With due deference to the learned Jurist who wrote the opinion, we state that this contention cannot be brushed away with a mere sweep of the hand.

C. THE STATUTES VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITION AND ARE INVALID.

"The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U. S. Constitution, Art. I, Sec. 8 (3)

The facts in the case of **Foster-Fountain Packing Co. and Sea Food Co. vs. E. J. Haydel, et al.**, 278 U. S. 1 (1928) are similiar to the facts in the case at bar. In the Foster-Fountain Packing case, plaintiff was in the business of shrimping off the coast of Louisiana and shipping the unhulled shrimp to the Sea Food

Company in Mississippi where they were canned. An act of Louisiana prohibited the shipping of unhulled shrimp from the state and the right to shrimp or can was restricted to residents of Louisiana. The Court held the act invalid and stated,

> "As representative of its people the state might have retained the shrimp for consumption and use thereof . . . but the purpose of the act is not to retain the shrimp for the people of Louisana; it is to favor canning of meat in Louisiana and violates the commerce clause of the Constitution."

In the case at bar, the purpose of the statutes is not to retain the fish and shrimp for consumption and use in South Carolina or to preserve them, but is merely a tax measure which in effect impedes interstate commerce and is thus violative of the commerce clause of the United States Constitution.

Although a state has power to tax property within its confines, whether employed in interstate commerce or not, it cannot impose a tax for a privilege of engaging in such commerce.

Independent Warehouses vs. Scheele
45 Atl. (2d) 703 (N. J.)

Aerated Products Co. of Philadelphia, Pa.
vs.
Dept. of Health of the State of New Jersey
59 F Supp 652

While interstate commerce must pay its way, nevertheless state cannot impose undue or discriminatory barriers around its borders to bar out trade from other states.

Nippert vs. City of Richmond
327 U. S. 416

While it is true that states can place regulations, and even restrictions to some extent, around articles even though they move in interstate commerce, the law of reason applies in such matters the same as in every other matter which affects the public interest, and in determing what constitues an undue burden upon interstate commerce by reason of a local tax the interest of the state is weighed and balanced against the national interest and courts will look to the nature of the state regulations, its objective and its effect.

State vs. Prudential Ins. Co. of America
64 N. E. (2d) 150

The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation, is not to be avoided by simply invoking the convenient apologetics of police power.

So. Pac. Co. vs. State of Ariz.
325 U. S. 761 (1945)

The Courts have held that it is not the mere fact or form of licensing by a state, but what the license stands for by way of regulation that is important in determining whether the commerce clause of the Constitution is violated.

Robertson vs. People of State of California
328 U. S. 440

In those states where poundage taxes were levied on fish and shrimp, which authorities have been previously set forth in said brief, the same were placed on the basis of inspection charges. In the present

statutes no pretense as to the reason for the imposition of this tax is made in the law at all. The trial Jurist attempted to supply this deficiency in the opinion, when he wrote, "As to interstate commerce, the requirement that the shrimp destined for out of state shipment be stamped and properly packed is a proper regulatory provision. It is reasonable relation not only to maintaining the good reputation of products originating in the State but also to insuring the collection of the one-eighth cent per pound tax, which in the absence of some such requirement could be easily evaded on shrimp shipped out of the State." (Record page 57).

This argument is fallacious in many respects. In the first place, the reputation of the products of a State are as well known when consumed by non-residents within that State as when consumed without that State. Further there is no provision made for inspection. Surely the payment of a tax on bootleg whiskey would not protanto make it bonded liquor. Finally the Act makes no requirement that the shipment be stamped as to size, quality, etc., so how could the requirement that they be packed, and shipped furnish any help to the revenue officers as to the type of crustaceans, its quality, or size or weight.

It is therefore submitted that under this section of the Constitution, said statutes are void in that they are not bona fide attempts to regulate the business of shrimping or to protect and to preserve the shrimp for the people of South Carolina, but are measures which were designed and put into operation for the sole and definite purpose of creating a monopoly of the shrimping industry in that state to the exclusion of citizens of every other state in the

Union, that the tax and the other regulations used were used designedly, having that sole object and nature, and thus the statutes violate the Commerce Clause of the United States Constitution.

D. THE STATUTES VIOLATE THE PRIVILEGE AND IMMUNITY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE.

1. "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."

U. S. Constitution, Art. IV, Sec. 2 (1)

One of the oldest and best known decisions based on the proposition that one state cannot discriminate against residents of another is the case of **Ward vs. Maryland,** 12 Wall. 418. Here a statute of Maryland prohibited a non-resident from selling goods without a license unless said goods had been manufactured in Maryland. No license was required of residents. The court held the statute to be a discriminatory tax and repugnant to the Constitution.

The cases of **Pavel vs. Richards,** 28 F. Supp. 992 (1928) and **Pavel vs. Pattison,** 24 F. Supp. 915 were concerned with an action to enjoin enforcement of an act of the Legislature of Louisiana which provided that a resident trapper pay a license of two dollars per year, provided he shall have been a resident for two years, but required that a non-resident trapper pay a tax of two hundred dollars per year plus a cash deposit of three hundred dollars. The court held the statute invalid and in the opinion states, "On the merit it seems clear that the effect of this statute is

to deny to Pavel and his employees operating under the leases, equal protection of the law in violation of the Federal Constitution." The Court cites,

U. S. Constitution, Art. 4, Sec. 2

Ward vs. Maryland
12 Wall. 418

Booth vs. Lloyd, et al
33 F. 593

Chalker vs. Birmingham and N. W. R. Co.
249 U. S. 522

One of the rights secured by United States Constitution, Art. 4, Sec. 2, is that of a citizen of one state to remove to and carry on business in another, without being subjected in property or person to taxes more onerous than the citizens of the latter state are subject to.

Shaffer vs. Carter
252 U. S. 37

The constitutional provision that the citizens of each State shall be entitled to all privileges or immunities of citizens in the several states prevents a State from discriminating against citizens of other states in favor of its own citizens.

Hague vs. C. I. O.
307 U. S. 496

The Privilege and Immunity clause of the Constitution forbids arbitrary distinction against citizens of other States.

Richter vs. East St. Louis and S. RR Co.
20 F. (2nd) 220 (D. C. Mo.)

There are many other cases which hold in unequivocal language that a State cannot discriminate

against citizens of other States in favor of its own citizens,

State of Minn. vs. Barber
307 U. S. 496

Georgia Power Co. vs. City of Decatur
281 U. S. 505

Chalker vs. Birmingham
249 U. S. 522

Hess vs. Pawloski
274 U. S. 352 (1924)

Sunday Lake Iron Co. vs. Wakefield
247 U. S. 350

Walling vs. People of Mich.
116 U. S. 446

Ratta vs. Healy
292 U. S. 263

State cannot establish different codes for citizens of its own and for citizens of other States unless character of the act is affected by residence,

Smith vs. Loughman
157 NE 753
245 NY 486 (1927)

Certiorari denied:
275 US 560

It needs only a reference to the above case to establish that residence has no rationale as far as fishing is concerned.

Another case in point held that the New York income tax law which allows residents of New York one thousand dollars personal exemption but denies same

to non-residents violates the United States Constitution, Art. 4, Sec. 2.

Travis vs. Yale and Towne
252 U. S. 60

Although concerning Alaska, a territory rather than a state, the case of **Haavik vs. Alaska Packers Association,** 263 U. S. 510 (1924) is analogous to the case at bar. An Act of Alaska imposed upon each resident fisherman of Alaska a tax of five dollars for school purposes, and upon each non-resident fisherman a tax of five dollars. The court held the tax valid on the facts which showed that the plantiff, a non-resident, actually was within the jurisdiction of Alaska for four months of the year and was entitled to enjoy the protection of Alaska, and in paying the five dollar tax was paying the same amount required of all residents of Alaska.

Another case concerning Alaska where higher tax for non-residents than residents was held valid is the case of **Anderson vs. Smith,** 71 F (2nd) 493. Here the Court upheld a tax of twenty-five dollars imposed by the Territory of Alaska on non-residents for the use of gill nets. However, the Court stated:

> "Territory of Alaska may fix license fees for fishing in waters of Alaska and in so doing may discriminate between residents and non-residents provided that the license exacted of citizens of the United States non-resident in Alaska **is not so exorbitant as to practically prohibit or so unreasonable as to interfere with rights of fishing granted by Congress."**

In line with this decision is **Freeman vs. Smith,** 44 F (2nd) 703 in which an Alaskan statute exacting a

tax of one dollar on resident fishermen and two hundred and fifty dollars on non-resident fishermen was held invalid.

See also:

Highman Towing Co. vs. Cocreham
70 F. Supp. 628

In **Skiriotes vs. Florida,** cited supra, the court says,

> "Equal protection clause is not violated by a statute, applicable equally to all persons, forbidding use of diving apparatus in taking commercial sponges."

In **Manchester vs. Mass.,** cited supra, we find the language,

> "The statute of Massachusetts . . . . was passed for the preservation of the fish and makes no discrimination in favor of citizens of Massachusetts and against citizens of another state."

In **Barbier vs. Connolly,** 113 U. S. 27, is the rule that the state has broad police powers if it affects equally all persons similarly situated.

The Court's attention is called to the further fact that the Statute, amended Sec. 3379 Statutes of South Carolina, (Record page 15) which fixes the cost of the licenses, not only makes two classifications, to-wit: the amount charged residents as against non-residents, but also differentiates between non-residents, persons of the same class, in that it fixes the license exacted of non-residents who have operated previously for a fixed time off of the shores of the State in the sum of One Hundred Fifty ($150.00) Dollars while it exacts a Twenty-five Hundred ($2500.00) Dollars

license of freshman non-resident fishermen. Such a difference smacks strongly of class legislation.

It is fundamental that residents and non-residents engaged in the same occupation or business may be treated substantially alike in the matter of imposing a business license.

O'Connell vs. Kontojohn
179 So. 802.

A state in promulgating fishing regulations may not make any arbitrary discrimination against any class of citizens; they may attach reasonable conditions as to such matters as the manner in which fishing is done, or as to the size or kind of fish to be taken from the waters of the State,

Fugett vs. State
188 S. W. (2nd) 641 (Ark. 1945)

Thus a tax measure to be valid must lay its burdens uniformly upon all those who come within a proper classification of persons to be subjected to its burden and such classification must have some reasonable basis for differentiation between those who are and those who are not to be taxed and must be founded upon some natural, intrinsic and constitutional distinction,

Koenig vs. Johnson
163 P. (2d) 746 (Cal. App.)

See:

Pac. Coast Dairy vs. San Francisco
8 P. (2nd) 140 (1936)

And so while legislative discretion is broad, nevertheless where such action is manifestly arbitrary, un-

reasonable, inequitable and unjust and causes an imposition of burdens upon one class to the exclusion of another without reasonable distinction, the statute will not be sustained,

State vs. Lawton
172 P (2nd) 465

Under the Puerto Rico organic law where uniformity in taxation is only required on a geographic basis, uniformity can be challenged if the classification is on a discriminatory geographic basis.

So. Port Rico Sugar Co. vs. Buscaglia
154 F (2) 96

followed in Standard Oil Co (N J) vs. Tax Court of Puerto Rico
154 F (2) 293

Similarly a statute relating to itinerant vendors with provision for license fees but with intent that residents of State should not pay license fees nor residents of other States whose laws impose no burden on Maine residents peddling there, held invalid in entirety because of discrimination in favor of Maine residents intended also to reply in reciprocal indulgence to residents of other States,

State vs. Cohen
177 Atl. 403
131 Me. 293 (1935)

Likewise a license ordinance exempting dairy and farm products produced in state was held invalid as abridgement of privilege and immunities rights of citizens of other states,

Ex Parte Smith
128 So. 864
100 Fla. 1 (1930)

And an ordinance which fixed higher license tax for non-resident bakeries than for resident bakeries held unconstitutional under privilege and immunities clauses,

Ward Baking Co. vs. City of Fernandina
29 F (2d) 789
D. C. Fla. 1928

State cannot arbitrarily exclude individual citizens of United States from doing business within State,

Davidson vs. Doherty Co.
241 N W 700
214 Iowa 739 (1932)

See:

Little vs. Miles
169 S E 220
204 N. C. 646

A city ordinance which prohibited issuance of barber shop license to persons not residents of county for at least one year prior to applying, held invalid under privilege and immunity clause.

City of New Brunswick vs. Zimmerman
79 F (2d) 428 (N. J. 1935)

See:

Ex Parte Wacholder
36 P (2d) 705
1 Cal. App. (2d) 254 (1934)

State vs. Johnson
291 S. W. 89
172 Ark. 866

Courts function to determine in each case whether circumstances justify challenged regulations as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.

Paramount Pictures vs. Langer
306 U. S. 619

The limitation on legislative discretion in making classifications in statutes is that classifications should not be arbitrary nor a subterfuge to shield one class and unduly burden another nor unlawfully oppress in its administration.

Frazier vs. State Tax Commission
175 So 402
110 A L R 1479

People vs. Chapman
301 Mich 584
4 N W (2d) 18

State vs. King
188 Atl. 775

Kelso vs. Bush
88 S. W. (2d) 594

Welch vs. State of New Hampshire
306 U S 79

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside; no state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

U. S. Constitution, Art. XIV. Sec. 1

While conceding the broad powers of a State to impose taxes upon its citizens, and in this sense all who transact business within its borders are citizens for the purpose of taxation, such powers are not without constitutional limitation. In **Morton Salt Co. vs. City of South Hutchinson** 159 F (2d) 897, the Court stated,

"But, however great the legislative power of taxation, it is not wholly without constitutional limitations. The due process and equal protection clauses of the Constitution do provide some measure of protection against the abusive exaction of a tax. The test of due process, say the Courts, is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. In other words the query is, what has the state given for which it may ask return. **Wisconsin vs. J. C. Penny Co.**, 311 U. S. 435, 85 L. Ed. 267. If the tax imposed clearly results in such a flagrant and palpable inequality between the burden imposed and the benefits received that it amounts to an arbitrary taking of property without compensation, it is said to violate the Fourteenth Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations."

Another decision which appellants wish to point out is the case of **Glicker vs. Michigan Liquor Commission,** 160 F (2d) 96, which, although concerned with the subject of liquor rather than fishing, is based upon the limitations imposed upon a states' police power by the Fourteenth Amendment. The Court used the following expression,

> "We recognize the right of a State to regulate, or even prohibit, through the exercise of its police power, the pursuit of certain businesses and occupations which because of their nature may prove injurious or offensive to the public. Such regulation is not prohibited by the Fourteenth Amendment, but it is well settled that such regulation is not unlimited in scope, but is subject to the limitation imposed by that Amendment. While the Federal Government does not have the right to regulate such matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment to prevent such regulation from being arbitrary and discriminatory."

In the case at bar, the authorities of South Carolina apparently are proceeding on the theory that the fish and shrimp business is by nature so interwoven with the health, morals and security of the State that the state has the right to regulate and by such regulation to practically prohibit its existence under its police powers. Appellants do not concede that fishing or shrimping are in the same category with the sale of liquors, maintenance of pool rooms, and other occupations that may prove injurious or offensive to the public. Even if fishing were in the same category with

these occupations universally recognized as being the special subjects of police regulations, it still would not be within the province of the State to pass arbitrary and discriminatory legislation.

Appellants contend that the statutes of South Carolina are clearly discriminatory. The taxes required of non-residents of South Carolina are so exorbitant as to practically prohibit fishing, and are thus confiscatory. The annual tax required of a non-resident fisherman is twenty-five hundred ($2,500.00) dollars, while the annual tax imposed on residents of South Carolina is only twenty-five ($25.00) dollars, a difference of one hundred times as much. The statutes impose additional undue burdens such as requiring the catch to be brought into ports of South Carolina for purposes of packing and shipping and then the payment of a poundage tax, which necessitates the renting of facilities and refrigeration since shrimp cannot be dumped into the streets.

In addition the statutes require the payment of Twenty-five hundred ($2,500.00) dollar license unless the fisherman had fished in the waters of South Carolina the previous year, and finally if the cup of the "foreigners" was not already overflowing, that only one hundred of these persons could enter the sacred waters of South Carolina. The only requirement that South Carolina did not exact of these fishermen was a visa and a passport.

The far reaching implications and the malice behind the enactment of these statutes is the unheard of prerequisite to the issuance of a license that income tax be paid by non-residents not on profits from the catch during the year for which the license is being

issued, but on profits earned in the previous year even before the passage of the present statutes without regard to the place where the individual or corporation is domiciled and without regard to the state in which these profits are earned. In other words, this means double taxation in its most onerous form.

Although the lower Court ruled against appellants in holding that the statutes under attack were constitutional, it indicated that it was ruling adversely to appellants because it felt it was a Court created for the determination of questions of law rather than policy and it was bound to follow what it thought to be the previously established rules of the Federal Court. The Court's attention is, therefore, called to this expression by the learned Judge of the lower Court who wrote the opinion, "If these decisions are to be over-ruled, the matter is one for the Supreme Court and not for us." (Record page 55).

E. BECAUSE THEY ARE IN CONFLICT WITH FEDERAL AUTHORITY OVER, AND FEDERAL POLICY WITH RESPECT TO, FISHING ON THE HIGH SEAS.

In so far as they apply to fishing in coastal waters, they also conflict with Federal authority and policy in coastal waters.

The appellants' occupation is primarily that of fishing on the high seas and in the Atlantic Ocean.

See:

U. S. vs. Rogers
150 U. S. 249, 281

for definition of "high seas," also,

1 Benedict on Admiralty, 84

Consistent with our traditional national policy of "freedom on the seas,"

See:

> U. S. vs. California, supra, in which this Court held, "This Country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations,

this Court has said that "the Ocean belongs to no one nation but is the common property of all." **Lord vs. Goodall,** 102 U. S. 514, 544. Clearly, fishing in the ocean and on the high seas, as navigation, is "necessarily national in character and a matter of 'external concern' affecting the nation as a nation in its external government." **Lord vs. Goodall,** supra, at p. 544.

See:

> U. S. vs. California, supra,
>
> "But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units."

In addition to the exercise by Congress (pursuant to its authority under Article I, Section 8 of the Constitution) of jurisdiction over the high seas generally by express Congressional acts, e. g. Navigation (33 U.S.C.) and Shipping (46 U.S.C.), Congress has enacted particular legislation pertaining to "Regulation of Fisheries" (Ch. 17, U.S.C., Sec. 531-534).

Moreover, as this Court has pointed out "controversy has arisen among nations about rights to fish in prescribed areas" (**U. S. vs. California**, supra, at p. 1421).

And these international controversies were resolved not by action by the states or territory involved but by the national government through its treaty-making power,

See:

U. S. vs. California, supra, at p. 1423.

and these treaties drew no so-called "three-mile line."

See:

37 U. S. Stat. at II, 1542, U. S. Treaty Series No. 564

Northern Pacific Halibut Act of 1937, 50 Stat. 325, 16 U.S.C. Sec. 772

Halibut Treaty, Treaty Series No. 917

Salmon Convention of 1930, Treaty Series No. 918

For both history,

See:

e. g. Treaty of 1778 with France, 8 Stat. 12, 16

Convention of 1818 with Great Britian, 8 Stat. 248, 249

Treaty of 1871 with Great Britian, 10 Stat. 1090, 17 Stat. 863, 869, 870

Convention of 1937 with Canada, 50 Stat. 325, 16 U.S.C. 772

and experience,

See:

Jessup, Law of Territorial Waters and Maritime Jurisdiction (1927) at P. 462

Fulton, Sovereignty of the Sea (1911), Ch. V, (pp. 694-740)

Daggett, The Regulation of Maritime Fisheries by Treaty (1934), 28 A.J.I.L. 693

Jessup, The Pacific Coast Fisheries (1939), 33 A.J.I.L. 129

Allen, Control of Fisheries beyond Three miles (1939), 14 Wash. Law Rev. 91

have demonstrated the truism of the expression that "fishermen, fish and ocean currents pay little attention to these lines or so-called territorial waters."

Thus, pursuant to Executive Order No. 9634 (10 Fed. Reg. 12305), the President, in Proclamation No. 2668 (Sept. 25, 1945, 10 Fed. Reg. 12304), recognized the "inadequacies of present areas for protection of fishery resources contiguous to its coasts;" and with a view of "improving the jurisdictional basis for conservation measures and international cooperation" proclaimed our national policy "with respect to coastal fishing in certain areas of the high seas," both in areas developed by our nationals alone and jointly with other nationals.

Thus the Proclamation announces the principle that where fishing activity "have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones of either established under agreements between the United States and such other States; and all fishing activities

in such zones shall be subject to regulation and control as provided in such agreements."

It is submitted, therefore, that because of the present day vast economic importance of the fishery industry and its complex relations not only to the individuals, the States and the National Government, but also as it affects the citizens, the States and the National Government in their relations with the citizens of foreign states and those foreign countries themselves, that the right to regulate fishing, both in the coastal waters on the high seas, and upon the high seas beyond the three-mile limit, has become vested in the National Government, and particularly in so far as they affect running or migratory fish and shirmp.

Expanding economic changes and the growth of commerce require elasticity in the law. This Honorable Court has never taken a straight jacket position on such matters. The tendency of the Court to extend the 14th Amendment to primaries, etc. is just one evidence of that fact. Had this Court adhered to the orthodox view of the trial Court, the right of the government to build or help build the present system of highways and other vast powers exercised by the government in advancement of science, health, education, and the welfare of its people could not have been undertaken under present Constitution, and much of the growth of the United States would have been retarded.

We submit that the States acquire no exclusive proprietory rights over such fish or shrimp while passing through their waters and if they do acquire the right of regulation, it must be exercised reasonably and judiciously with due regard to the rights of other states and the inhabitants thereof.

SUMMARY

Appellees place great stress upon the decision of **McCready vs. Virginia,** 94 U. S. 391, contending that based upon this decision the State has jurisdiction to control its fisheries to the exclusion of citizens of other states and its own citizens. The McCready case was concerned with waters within the limits of the state and in that case there was no question of the fact that the statute was a bona fide conservation statute. The case of **Pollards Lessee vs. Hagin,** 3 How. 212, like the McCready case, was merely concerned with inland waterways. In commenting on the Pollard case, Mr. Justice Black in the case of **U. S. vs. California,** cited supra, stated, "We are not persuaded to transplant the Pollard Case of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean."

Appellees also argue that the Manchester, Louisiana and Abby Dodge cases cited in **U. S. vs. California,** are authorities for the proposition that the state has unlimited right to control fishing.

The Supreme Court answered this question on page 16 of the decision in U. S. vs. California where the court used this expression, "That this question remained undecided is evidenced by **Skiriotes vs. Florida,** 313 U. S. 69, where we had occasion to speak of Florida's power over sponge fishing in its territorial waters. Through Mr. Chief Justice Hughes we said: 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the state statute so far as applied to conduct within the territorial waters of Florida . . . is within the

police power of the State." In other words the Supreme Court in the California case stated that if the states did have powers over fishing it was limited to conduct within the police powers and did not give the state the right to tax indiscriminately.

Other cases cited by appellees are not authorities for the purposes contended by appellants. In the case of **Patsone vs. Penn.**, 232 U. S. 138, the court merely held that the state had a right to deny aliens the right to use guns and therefore could restrict the right to hunt. This decision is based on the police powers of a state.

Another case along these lines is the very recent decision of the Supreme Court of California entitled **Takahashi vs. Fish and Game Commission** rendered October 17, 1947 and reported in 30 A. C. 723 et seq. The case deals with the rights of the State of California to prohibit commercial fishing by aliens. Although in the obiter by a majority of the Court it reiterates the position of the appellees, we cite this case because we feel that it is proper to call to the attention of the Court the language of Judge Carter who on page 745 of the dissent, said,

> "While the State may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection clause of all meaning."

The statutes involved in the case at bar are not conservation or preservation measures for many reasons. It is a matter of common knowledge that shrimp are migratory in nature and are found along the wa-

ters off the shores of different sections of the United States at various times of the year. If such fish or shrimp were local both as to origin and as to habitat, it is conceivable that a state could, where it was absolutely necessary, pass effective conservation measures, such as Florida did in the sponge case where it prohibits the use of machinery for taking sponges, and such as other states might do in reference to timber or other products of the soil that are local in character. Free running or swimming fish know no borders and therefore it is idle to engage in the pretense that any state could pass conservation measures dealing with migratory shrimp when no one even knows what percentage of these shrimp pass on their journey within the mythical three-mile limit of the state. Where bona fide conservation measures have been passed, in each case the record has disclosed not only the necessity for such laws but the operation of the same has been made in such a way that like the rain it falls equally upon the rich and the poor alike.

It is a well known fact in the southeastern portion of the United States that keen rivalry has arisen between the states of South Carolina, Georgia and Florida in regards to shrimp and fish. The growth of the shrimp industry in Georgia and Florida has outstripped the growth of the shrimp industry in South Carolina and in order to freeze out and smother the fishing industry in these other two states South Carolina publicly and deliberately without rhyme or reason, in the belief that it had absolute and despotic power, undertook to pass laws which were destined to accomplish this sinister purpose. This is not the first time in the history of South Carolina that it has un-

dertaken to flaunt the laws of this country, and in this case it is living up to the motto engraved on its flag, "Don't tread on me." All laws must have a reasonable relation to the objects for which they are passed. If South Carolina had seen the necessity to conserve shrimp caught for consumption in that state it would have undertaken to have limited the number of pounds of shrimp that could be caught in any one season. Laws of such a type are not drawn without great care nor are they loosely worded, especially where the framers thereof know that they will be tested in the highest courts of the land. These statutes are not conservation measures because they do not "conserve the shrimp caught for consumption in the state of South Carolina." They are not health measures because no provision is made for inspection. They are not police regulations because no provision is made for regulations or enforcement. They are actually not tax measures because the state of South Carolina knows that no non-resident could pay the license exacted of him and operate for more than one season. They are purely "Hitlerian" laws.

Appellees fall into the error of contending that since these statutes are allegedly conservation measures, they are therefore ipso facto legal, regardless of how many sections of the Federal Constitution they violate. We are not so certain that this Court would agree, even if the record showed these measures to be conservation measures.

Appellants share the same high regard for the learned Judge who wrote this opinion as this Court does. We fear that the trial Court failed to carefully scan the record in this case and assumed that since the

statutes purported to be conservation measures, they were just that, and therefore the old rule of self preservation should first be applied. The facts however, negative such a view. The record shows that there were more shrimp hauled out of the waters of South Carolina after the enactment of this law than before, and that its only effect has been to create a monoply for the shrimping interests of South Carolina.

Assuming that this Honorable Court might hold to the view of appellees that the states possess this unbelievable right, we come to the final proposition as to how far can a state go to discriminate unreasonably and unjustly. This great nation has the inherent and unquestioned power to bar aliens and undesirables from her shores, but once this country removes the barrier and admits them, can this nation then deny to them the use of the courts, the right to labor, or own property, to trade or enjoy the four freedoms? By the same analogy, granting that the state had the right to determine when its doors should be closed for reasons best known to itself, could it after having opened these doors, proceed to discriminate unjustly and unreasonably against the citizens of other states, or is it compelled to obey the laws of the land in the same degree that this country expects other citizens to act.

The issues involved in this case are much deeper than the question as to whether or not the waters off the state of South Carolina should be closed to the residents of the forty-seven other states. The issues involved will determine whether or not this country should be cut up into forty-eight "little worlds." If any one state is given the right to drop an iron curtain around its boundaries or keep out the citizens

of another state because it feels that it has a monopoly over certain products peculiar to that state then it would be possible for states such as Pennsylvania and Alabama to tie up all the manufacturing enterprises in this country by cutting off the supply of coal unless royalties were paid or concessions or subsidies granted, Colorado could hold back the supply of copper, Texas could curtail the supply of oil, a few Southern states could hold back their supply of cotton and tobacco, and eventually, instead of having a system based on our present theory of free trade, we would have one in which each State could have its own tariff wall and the barter system would be the prevailing scheme. As we have previously pointed out in this brief, changing philosophies of life are necessarily causing a change in our economic and legal concepts. Great changes have taken place within the past decade. Shortly after the First World War the Congress of the United States passed the Johnson Act which undertook to prohibit the United States from making any loans to foreign countries who had not repaid loans made to them for rehabilitation purposes after the First World War, and yet within twenty years we find the almost unanimous desire in this country, in order to check the spread of Communism, that this country send billions of dollars to the hungry and oppressed people of Europe that these people may rise and live again.

We feel that even under the law as it stood at the time of the McCready case that the state of South Carolina had no right to enact the present measures. The statutes in question reflect a philosophy that has "Gone with the Wind," and under the law as it now exists, such statutes are untenable.

The Court's attention is called to the fact that there is no dispute as to the facts of said case. No exceptions to conclusions of fact as found by the three Judge Court, nor to any of the evidence offered have been made. Therefore, the case at bar does not hinge on any controverted facts, but rather on the inferences, implications and conclusions which follow from the established facts.

On page 60 of the printed record, the trial Court found certain conclusions of fact to which reference is made. These facts sustained the question of jurisdiction. The Court found that the plaintiffs fished for shrimp within and without the three mile maritime belt of the ocean off the shores of the State of South Carolina and that the plaintiffs are subject to the statutes in question, and that **"plaintiffs will be unable to continue their business if these statutory penalties are invoked against them."**

> The Court further found on page 61 of the printed record that "if the contentions of the plaintiffs as to the invalidity of the statutes were valid, they would be irreparably damaged by their enforcement and have no adequate remedy at law, in that they would be forced by defendants to pay large sums by way of taxes for which no means of recovery is provided by law**********the tax or the injury in case of some of the plaintiffs being well in excess of $3,000.00".

Appellants have contended that the record shows that the statutes in question were not bonafide conservation measures, and that as a result of their enactment, more shrimp have been caught than before the statutes were adopted.

In support of this contention, appellants call the Court's attention to stipulation 10 on page 30 of the printed record, which follows:

> "It is stipulated and admitted that the South Carolina Fishing Commission issued more fishing licenses the year of 1947 than it did in the year 1946. In the year 1946 two hundred fifty-four (254) licenses were issued, of which one hundred fifty-four (154) were for South Carolina residents and one hundred (100) for out of state residents. In the year 1947 two hundred seventy-one (271) had been issued, of which all but fifteen (15) were to South Carolina residents."

On page 38 of the printed record appears the Thirty Eighth Annual Report of the South Carolina Board of Fisheries, Year ending June 30, 1944, in which the statement is made,

> "There were 115 shrimp boats operating in South Carolina waters during this season which is a slight increase over the number of boats operating last season. ********** We feel that there is an increase in the amount of shrimp in our waters this season."

On pages 39, 40 and 41 of the printed record appears the Thirty-Ninth Annual Report of the State Board of Fisheries, Year ending June 30, 1945, in which the statements are made,

> "O.C.F. has authorized construction of 2,128 fishing craft. All but 85 of which are expected to be completed end of this year. **This will make productive capacity greater than at any time in our history.** This signifies that the fishing industry should begin to spend more money in merchandising its

products than ever before in its history ********** South Carolina is in dire need of having the proper facilities to ice fish, shellfish and cold storage facilities for same, and other equipment such as proper docks, etc. **If these facilities were available, in our judgment, it would increase the volume of the fish industry many times.**

Again on page 40 of the printed record appears the comment,

"The addition of 500 trawlers in the Atlantic area will greatly increase the efficiency of the shrimp fleet and increase its range."

Again on page 41 of the printed record appears the statement,

"We are expecting an enormous increase in the volume of shrimp during the coming year as the war restrictions will be raised, and we are expecting labor to be plentiful. There will be an increase in the number of boats and the demand is large, and, we think, will take up our increase for the coming year.

On page 44 of the printed record appears the Fortieth Annual Report of the State Board of Fisheries, Year ending June 30, 1946, in which the statement is made,

"The shrimp industry has grown very materially during the past season over the previous season. I will show you the figures of the past season which was 1944-1945 and the present season which is 1945-46. The boats operating in South Carolina in 1944-45 were 156 consisting of boats owned by the citizens of South Carolina 77 and boats owned outside 79. The number of boats

operating in our State in the 1945-46 season was 254. Number of boats owned by citizens of South Carolina was 154. Number of boats operating in State by outsiders was 100. **We are very much pleased to see the decided increase of the state owned boats operating in this State."**

Again the statement on the same page,

"The number of pounds of shrimp caught during the season 1944-45 in the coastal waters of South Carolina amounted to 2,548,955 lbs. Shrimp headed amounted to 1,535,355 lbs, in the 1944-45 season. Shrimp caught in the South Carolina waters in the 1945-46 season amounted to 5,037,065. Shrimp headed in the 1945-46 season amounted to 3,021,343 lbs. **To be able to make this report is certainly a pleasure to the State Board of Fisheries as we are able to show that the catch of shrimp this season was nearly twice as large as in the previous year."**

In support of our contention that shrimp are a migratory fish and neither spawn nor are they local to the waters of South Carolina, we submit the following portions of the record, to-wit;

Testimony of **S. W. Davies** on page 31 of the printed record,

"The shrimp follow the season and they work their way down the coast and that is the reason I am not fishing in Georgia waters at this time." ********** The shrimp run on the coast from one state to the other and we follow them up and down the coast."

Testimony of **George G. Dodge** on page 33 of the printed record,

"I would say the fishing season off the coast of South Carolina runs from eleven to thirteen weeks, from the middle of August, until the end of September. The shrimp then move south. They begin their southward migration about just as soon as it begins to get cool."

In its Fortieth Annual Report, the State Board of Fisheries, on page 42 of the printed record says,

"The greater portion of the shrimp reared in North Carolina, South Carolina, Georgia and North Florida are migratory moving south along the coast during the fall and wintering in Central Florida." *********
The accumulation of the facts secured by the above described means shows that the spawning occurs from March into September in the open waters of the Atlantic Ocean."

In support of our contention that the poundage tax is being imposed on imports, we wish to cite the following portions of the record:

Testimony of **S. W. Davies** on page 32 of the printed record,

"We fish outside in the ocean. At times we are out five or six miles and at times we are right against the shore, according to where we locate the shrimp at. We do not fish in inland waters, but we do fish within the three mile limit."

On page 33 of the printed record, Mr. Davies testified,

"This fishing out of season was off the coast of South Carolina in the open sea."

In support of our contention that the license and

the poundage tax sought to be exacted, including the attempted collection of an income tax are an unreasonable burden on interstate commerce, we cite page 34 of the printed record, testimony of George G. DODGE,

> "I would estimate that 95 or 98 per cent of the shrimp that are caught enter interstate commerce and most of the shrimp are shipped to New York, Baltimore, Philadelphia and Washington."

In support of our contention that the payment of the various licenses, taxes etc would be confiscatory, we cite page 34-35 of the printed record, testimony of the same witness,

> "Then if I paid the South Carolina tax of Twenty-Five Hundred ($2,500) Dollars, the non-resident license, the boat earnings would be insufficient to pay the license if I packed them in South Carolina I would have to pay a packing charge of Five ($5.00) Dollars a box, which would further reduce my profit. The loss would be so considerable on each boat as to make it prohibitive."

Further on page 40 of the printed record, reading from the Thirty-Ninth Annual Report of the South Carolina Board of Fisheries,

> "Shrimp are generally recognized as being a highly perishable food. Unlike meats they are susceptible to a ripening process. It is therefore, essential to keep them packed in ice or stored at temperatures low enough to prevent spoilage or to subject them to some form of preservation. **With such a product, speed, and distribution to consuming centers is a factor of importance.**"

Despite this admonition, the statutes require that the shrimp be brought into ports of South Carolina, taken off the boats where they are already placed in ice containers (altho the record is silent on this, it is a matter of common knowledge) required to be re-packed, and of course re-iced, and then shipped with danger of spoilage, cost of additional money and loss of time in getting them to the consuming markets.

We refer the Court to a previous statement in the Thirty-Ninth Annual Report of the South Carolina Board of Fisheries on the necessity of refrigeration facilities.

The real reason behind these statutes are found in the admission by the South Carolina State Board of Fisheries in the Thirty-Eighth Annual Report on page 38 of the printed record,

> "The shrimp boats operating in our waters are from many other states as we have a very small fleet of shrimp boats owned by South Carolinians." (Our comment, conditions changed after the passage of these restrictive measures).

On page 47 of the printed record, in excerpts from the Thirty-Ninth Annual Report, this same board says,

> "Now that the was is over we feel that conditions will soon be normal and that there will be quite an increase in the production, also, that labor will be more plentiful and thereby place the fishing industry on a very profitable basis."

In other words, now that the war is over, this is too good a thing to let outsiders profit in.

When this case was argued before the three Judge Court the appellants pointed out to that Honorable body the dangers which lie in the wake of such legislation. We argued that repressive measures beget repression and that sister states of South Carolina would not long remain quiescent in the face of the clamor of their own citizens who would be incensed because of these iniquitious laws. The Associated Press on November 24, 1947 carried a news item to the effect that the state of Florida had retaliated and was refusing even to issue licenses to fishermen of South Carolina who sought to comply with its provisions. Confirmation of the Associated Press dispatch is found in House Bill 438, Chapter 23777, Acts of 1947 of the State of Florida and the opinion of Hon. J. Tom Watson, Attorney General of Florida under date of December 18, 1947. The bill itself makes it unlawful for any non-resident person "to take or catch or assist in taking or catching, or for any non-resident boat to be used for that purpose ******* or to buy, sell or offer for sale any shrimp unlawfully taken or caught, unless a license had been issued." It further provided that non-residents could not obtain such a license unless a reciprocal agreement had been entered into with the authorities of the non-resident's State.

The Attorney General in his opinion, went a step further and held that the act applied not only to non-residents of South Carolina and their vessels, but also that they could not register their boats in Georgia and then take advantage of the Georgia-Florida reciprocal agreement.

The above proves that a chain reaction against South Carolina has set in among the various states

affected. Similar action will undoubtedly be taken as soon as the legislatures of the other states convene.

If these laws are upheld, other states which have fishing interests can be expected to retaliate in quick succession. We feel therefore, that a decision by your Honorable body against these measures would be the means of preventing not only the state involved but many other states from passing laws that infringe upon the privileges and immunities of the citizens of the several states in many other fields. Because of the legal authorities and the reasons presented in this brief we feel that the judgment of the learned trial court should be reversed and that each and every one of the statutes set forth should be declared illegal and unconstitutional.

Respectfully submitted,

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DEC 22 1947

IN THE SUPREME COURT OF THE UNITED STATES
JANUARY TERM 1948

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, and THE ATLANTIC SEAFOOD PRODUCERS, INC., a Corporation

Appellants

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, C. L. YOUNG, and J. A. WILCOX, composing the South Carolina State Board of Fisheries, a body corporate, and ALONZO B. SEABROOK, the Chief Inspector thereof.

Appellees

Appeal from the District Court of the United States for The Eastern District of South Carolina

BRIEF OF APPELLANTS

AARON KRAVITCH
ROBERT E. FALLIGANT
PHYLLIS KRAVITCH
JOHN J. BOUHAN

Counsel for Appellants

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, AND THE ATLANTIC SEAFOOD PRODUCERS, INC., A CORPORATION,
Appellants,

vs.

J. M. WITSELL, EDWARD M. BURROUGHS, E. L. SWEAT, C. L. YOUNG AND J. A. WILCOX, COMPOSING THE SOUTH CAROLINA STATE BOARD OF FISHERIES, A BODY CORPORATE, AND ALONZO B. SEABROOK, THE CHIEF INSPECTOR THEREOF,
Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to the provisions of Rules 7 and 12 of the Supreme Court of the United States, the Appellees move the Court to dismiss the appeal or in the alternative to affirm the judgment of the Court below upon the grounds:

I. That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, because:

(a) The State of South Carolina has jurisdiction to regulate fishing within its coastal waters within the three mile maritime belt;

(b) No constitutional rights of the appellants are infringed by the State's refusal to allow them to fish within its waters upon the same terms afforded to residents of the State;

(c) The State is not imposing a tax on imports, and the enforcement of its fisheries laws does not constitute an unconstitutional burdening of interstate commerce;

(d) The appellants have failed to show that the statutes attacked are other than proper conservation measures.

II. That appellants have no proper standing in a Federal Court of Equity to justify the relief sought, because:

(a) They have shown no clear and imminent irreparable damage sufficient to justify a Federal Court of Equity enjoining the enforcement of a State criminal law;

(b) Their conduct in the past demonstrates a flagrant disregard of the South Carolina Fisheries law, shows that no irreparable damage is threatened them, and calls for an application of the clean hands maxim;

(c) An adequate remedy at law is available to appellants in the courts of South Carolina, which courts should be permitted to pass initially upon the questions raised in the present cause.

Respectfully submitted,

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(S.) T. C. CALLISON,
Assistant Attorney General;
(S.) J. MONROE FULMER,
Assistant Attorney General;
Attorneys for Appellees.

(S.) ROBINSON & ROBINSON,
Of Counsel.

October 17, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, S. W. DAVIES, S. D. COLLINS, AND THE ATLANTIC SEAFOOD PRODUCERS, INC., A CORPORATION,
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J. M. WITSELL, EDWARD M. BURROUGHS, E. L. SWEAT, C. L. YOUNG AND J. A. WILCOX, COMPOSING THE SOUTH CAROLINA STATE BOARD OF FISHERIES, A BODY CORPORATE, AND ALONZO B. SEABROOK, THE CHIEF INSPECTOR THEREOF,
Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

The appellants, Georgia commercial fishermen, sought an interlocutory and permanent injunction before a three-Judge District Court, convened pursuant to Section 266 of the Judicial Code, against the enforcement by the defendants, South Carolina Conservation Officers, of certain "fisheries laws" of South Carolina. Appellants' contention, undoubtedly inspired by the opinion of this Court in *United*

States v. *California*, — U. S. —, 91 L. Ed. 1414, was that the State of South Carolina is without power to regulate fishing within the marginal three mile belt beyond low-water mark so as to establish different conditions for the fishing of those waters by residents and nonresidents, as in violation of the privileges and immunities clause of the Constitution and the equal protection clause of the 14th Amendment. It was further contended that the statutes impose a tax on imports and a burden upon interstate commerce in violation of Sections 8 and 10 of Article I. of the Federal Constitution.

At the hearing before the three-Judge Court a final decree was issued on 12 September 1947 dismissing the suit and denying the application for an injunction. The Court held that the plaintiffs had shown irreparable damage sufficient to justify a Federal Court of Equity in assuming jurisdiction, but on the merits held the South Carolina statutes valid.

It is appellees' position that appellants' constitutional questions are so unsubstantial as not to require argument; that they have shown no irreparable damage justifying the enjoyment of a state criminal law; that they have come into court without clean hands; and that they have an adequate remedy at law in the South Carolina Courts. Authorities supporting these latter points as well as demonstrating the unsubstantial nature of appellants' constitutional contentions are cited below.

I

Appellants' Constitutional Questions Are Without Substance, Having Been Settled by Decisions of This Court

A. South Carolina has jurisdiction to regulate the fisheries within its territorial limits, including the three mile maritime belt. *McCready* v. *Virginia*, 94 U. S. 391, 394;

Manchester v. *Massachusetts*, 139 U. S. 240; *Louisiana* v. *Mississippi*, 202 U. S. 1, 52; *The Abby Dodge*, 223 U. S. 166; *Skiriotes* v. *Florida*, 313 U. S. 69.

That doctrine is unaffected by the decision of this Court in *United States* v. *California*, — U. S. —, 91 L. Ed. 1414, where the question was not as to the State's exercise of police power over the marginal sea, but as to the conflicting proprietary interests of the State and the National Government in the oil deposits below the bed of the ocean.

B. The State having the absolute right to control and conserve its wild life for the benefit of its own citizens, neither the privileges and immunities clause of Article IV of the Constitution nor the equal protection clause of the 14th Amendment requires the State to accord equality of treatment in regulating its fisheries to non-residents and residents. *Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Race Horse*, 163 U. S. 504; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Haavik* v. *Alaska Packers Association*, 263 U. S. 510; *LaCoste* v. *Department of Conservation*, 263 U. S. 545.

C. The South Carolina fisheries laws do not impose a tax on imports, the only tax being upon those fish or shrimp taken within the three mile belt; nor do they burden interstate commerce in violation of Sections 8 and 10 of Article I. *Geer* v. *Connecticut*, *supra*; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Coe* v. *Errol*, 116 U. S. 517.

D. Plaintiffs make no showing that the South Carolina statutes attached are other than what they appear on their face to be—conservation measures for the protection of the State's supply of fish and shrimp for the State's own citizens. The much higher cost of enforcing the fisheries laws, particular their inspection features, against nonresident fishermen as compared to resident fishermen, is an obvious basis for the higher license fees charged the nonresidents.

Then too, the State is properly furthering its conservation purposes when it requires of non-resident fishermen "'a license fee so high as to limit their number and to reimburse the people of the State in some measure for the loss sustained by them from the fishing of those who are licensed." (*Toomer, et al.* v. *Witsell, et al.*, — F. Supp. —.)

II

Plaintiffs Have No Standing in a Federal Court of Equity

A. Appellants show no irreparable damage arising from the State's enforcement of its fishery laws sufficient to justify a Federal Court of Equity in enjoining the enforcement of a State criminal statute. The only threatened result is a multiplicity of criminal proceedings and an impairment of their private businesses which is not sufficient. *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri-Pacific R. Corp.*, 312 U. S. 45; *Douglas* v. *Jeannette*, 319 U. S. 163.

B. It was admitted at the hearing that all of the individual appellants have violated the laws which they attack by fishing without licenses in South Carolina waters during the 1947 fishing season; that all have criminal records in South Carolina for previous violations of other portions of the fisheries laws such as out-of-season fishing. The corporate appellant is not a fisherman. Persons manifesting such a wilful disregard of the South Carolina fisheries laws should be barred from a standing in a Court of Equity under the clean hands maxim and also because their flouting of the law shows that they will not be irreparably damaged by its enforcement.

C. Appellants' petition shows that there are criminal proceedings now pending in the South Carolina courts

against them in which all of the questions raised in the present cause may be determined. Therefore, there is an adequate remedy at law. Judicial Code, Sec. 267; 2 U. S. C. Sec. 384; *Wilson* v. *Shaw*, 204 U. S. 24.

This Court will not decide constitutional questions unless their determination is strictly necessary. *Rescue Army* v. *Municipal Court of the City of Los Angeles*, — U. S. —, 91 L. Ed. 1221, 1232.

Conclusion

It is submitted that the constitutional questions raised by appellants are unsubstantial and that they have no standing in a Federal Court of Equity to enjoin the enforcement of these State criminal laws.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 415

EARL J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, ET AL.,

Appellants,

vs.

J. M. WITSELL, EDWARD M. BURROUGHS, E. L. SWEAT, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

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* As amended, 1947.

BRIEF FOR APPELLEES

Supreme Court of the United States

OCTOBER TERM, 1947

No. 415

EARLE J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, *ET AL.*, APPELLANTS

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, *ET AL., ETC.*, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT

The appellants, five Georgia commercial fishermen and a Florida corporation which functions as an association of fishermen, brought this action in the District Court of South Carolina to enjoin the enforcement of certain portions of South Carolina's "Coastal Fisheries Law", contained in Sections 3299-3414 of the Code of South Carolina. The pertinent statutes are set out in an appendix to this brief.

Challenged are Section 3300 which declares that South Carolina waters, including that portion of the ocean with-

in three miles of low water mark are "a common for the people of the State for the taking of fish"; Section 3374, which imposes a tax of one-eighth cent per pound on green shrimp taken in South Carolina waters; Section 3414, which requires shrimpers in South Carolina waters to unload their catch in the state "and pack and properly stamp the same before shipping or transporting it to another state"; and Section 3379, which requires the licensing of all shrimp boats used in South Carolina waters.

Of these Code sections, only the last is of recent origin, the others having been in force for ten years or more. After a Joint Resolution of the General Assembly of South Carolina (44 Stat. 543) had, in 1945, created a Committee "to study coastal fishery laws", Section 3379 was amended by a 1947 Act (45 Stat. 576) to change the license fees charged for shrimp boats to $25.00 if owned by residents of South Carolina, $150.00 if owned by non-residents who had operated boats in South Carolina for the past three years, and $2,500.00 if owned by other non-residents. The maximum number of non-resident licenses was fixed at one hundred.

Each of the appellant fishermen fished in South Carolina waters in disregard of the law during the 1947 season (R. 3, 5, 25-27, 29, 32, 35); all have criminal records in South Carolina for out-of-season fishing and other violations of the Fisheries Law. (R. 25-27, 29.)

DECISION BELOW

When appellants' application for an interlocutory injunction was heard by the three-Judge District Court, convened pursuant to Section 266 of the Judicial Code, the case was submitted for a final decree. The Court, in its decree of 12 September, 1947, dismissed the suit and de-

nied the application for an injunction. The Court considered the constitutional questions on their merits and held that the South Carolina statutes were valid (R. 49, 73 Fed. Supp. 371).

This Court noted probable jurisdiction on 24 November, 1947.

SUMMARY OF ARGUMENT

South Carolina has the right to control and conserve the fish within its territorial limits, including the three-mile maritime belt, for the benefit of its own citizens. Such wild life is owned by the citizens of South Carolina, their ownership and right to take being subject only to the exercise of the State's police power and to any regulation of the Federal Government acting within its broad constitutional powers.

If that is true, and there is no deviation from the long line of authorities so holding, there is no merit in any of appellants' contentions. There is no violation of the Privileges and Immunities Clause since the inhabitants of one state do not have the "privilege" of sharing in property owned by the inhabitants of another. There is no violation of the Equal Protection or Due Process clauses of the Fourteenth Amendment since the State has the right to exclude citizens and residents of Georgia from its wild life resources. There is no tax on imports into South Carolina since the shrimp are taken from South Carolina's own waters. There is no burden upon interstate commerce since South Carolina has the right to condition the taking of its fish before interstate commerce commences.

The Court below correctly decided the constitutional issues in accordance with the established authorities, but it was unnecessary to do so. It could have denied the ap-

pellants the equitable jurisdiction of a Federal Court because they did not show irreparable damage justifying the enjoining of a State criminal law, and because they came into Court without clean hands.

ARGUMENT

I

THE SOUTH CAROLINA FISHERIES LAW IS CONSTITUTIONAL

Appellants' contention is that the State of South Carolina is without power to regulate fishing in its waters within the marginal three-mile belt below low water mark so as to establish different conditions for the fishing of those waters by residents and non-residents. Upon this basis they attack several of the South Carolina statutes pertaining to shrimping, but in the final analysis the attack is against the provision of Section 3300 that the waters of the state, including those within the three-mile limit, "shall continue and remain as a common for the people of the State for the taking of fish". If South Carolina can constitutionally maintain the fisheries within its waters as a common fishing ground for its people alone, all of appellants' constitutional arguments are answered.

Upon this issue it has been uniformly held that a State has the right to control its fisheries and other wild life for the benefit of its own citizens and may, in the exercise of that power, exclude others absolutely from the taking of

the wildlife or attach whatever conditions to the taking that it desires.[1]

The rule announced by these Federal decisions has been accepted by State Courts,[2] and by the authors of texts and encyclopedias.[3]

The announcement of the rule by this Court has been unequivocal:

> "These [the fisheries] remain under the exclusive control of the State, which has consequently the right in its discretion to appropriate its tidewaters, and their beds to be used by its People as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property.
>
> *McCready v. Virginia*, 94 U. S. 391, 395.

> "[The riparian states] can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, pearls, or amber, or other products of the sea."
>
> *Louisiana v. Mississippi*, 202 U. S. 1, 52.

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[1] *Geer v. Connecticut*, 161 U. S. 519; *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. 391; *Manchester v. Massachusetts*, 139 U. S. 240; *Lawton v. Steele*, 152 U. S. 133; *Ward v. Race Horse*, 163 U. S. 504; *Louisiana v. Mississippi*, 202 U. S. 1; *Lee v. New Jersey*, 207 U. S. 67; *People ex rel. Silz v. Hesterberg*, 211 U. S. 31; *Patsone v. Pennsylvania*, 232 U. S. 138; *The Abby Dodge*, 223 U. S. 166; *New York ex rel Kennedy v. Becker*, 241 U. S. 556; *Corey v. South Dakota*, 250 U. S. 118; *Hauoli v. Alaska Packers Association*, 263 U. S. 510; *LaCoste v. Department of Conservation*, 263 U. S. 545; *Republic Fish Flour Co. v. Gentry*, 267 U. S. 422; *Skiriotes v. Florida*, 313 U. S. 69; *Corfield v. Coryell*, Fed. Cas. No. 3230, 4 Wash. C. C. 371; *Anderson v. Smith*, 9 Cir. 71 Fed. (2d) 498; *Markovich v. Milner*, 34 Fed. Supp. 689.

[2] For example, *Commonwealth v. Hilton*, 174 Mass. 29, 54 N. E. 362; *State v. Gulley*, 128 N. C. 570, 38 S. E. 169; *Cummings v. People*, 211 Ill. 302, 71 N. E. 1021; *State v. Ashman*, 128 Tenn. 664, 135 S. W. 326; *State v. Robinson*, 25 R. I. 211, 55 Atl. 632; *People v. Schuyler*, 161 Mich. 64, 126 N. W. 644; *State v. Catholic*, 75 Ore. 267, 147 Pac. 372.

[3] 22 Am. Jur. 666, Section 2; 22 Am. Jur. 692, Sec. 36; 24 Am. Jur. 386; 15 C. J. S. 313, 61 A. L. R. 332.

"It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens if it pleases."

Patsone v. Pennsylvania, 232 U. S. 138, 145.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State * * *, subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution."

New York ex rel Kennedy v. Becker, 241 U. S. 556, 562.

"The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the State may regulate and control the taking, subsequent use, and property rights that may be acquired therein."

LaCoste v. Department of Conservation, 263 U. S. 545, 549.

"Over these fish, and over state wild game generally, the state has supreme control."

Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 426.

The State's exercise of this right to preserve the fish for its own residents violates neither the Privileges and Immunities Clause, nor the Fourteenth Amendment.

In *McCready v. Virginia*, 94 U. S. 391, a Virginia statute prohibiting citizens of other states from planting oysters in Virginia waters was held valid, the Court saying that the plaintiff was not entitled to the same rights in this respect as Virginia citizens, who had a property right in the fisheries rather than "a mere privilege of immunity of citizenship".

In *Patsone v. Pennsylvania*, 232 U. S. 129, the Court sustained a conviction under a Pennsylvania statute making it a criminal offense for an alien to kill a wild bird or animal and, for the purpose of enforcing the prohibition, making it unlawful for such alien to own or be possessed of a rifle or shotgun.

In *Haavik v. Alaska Packers Assoc.*, 263 U. S. 509, it was held that the Territorial Government of Alaska could validly impose an annual license tax upon non-resident fishermen without violating the Privileges and Immunities Clause of the Constitution. A similar holding as to Alaska fishing licenses was made in *Anderson v. Smith*, 9 Cir., 71 Fed. (2d) 493, where it was said "it is equally well settled that states have a right to exact a higher license fee from non-residents than from residents for the privilege of hunting game within its borders."

> "The privileges and immunities guaranteed to the citizens of the United States by the Fourteenth Amendment do not include a right to share in the heritage of the people of Oregon, by fishing in the McKenzie River or any other stream within that State. Nor may any person fish in any such bodies of water solely by virtue of his citizenship in the United States. The right to take from the fisheries held in common by the citizens of Oregon is acquired only through membership in that body."
>
> *Thompson v. Dana*, 52 Fed. (2d) 759, 762.

The cases are likewise clear that interstate commerce is not unconstitutionally burdened by a State's refusal to allow its wild life to be taken except under stipulated conditions. The fact that appellants would take the shrimp from South Carolina to Georgia if they were allowed to catch them does not give them the right to catch them. "A man cannot acquire a right to property by his desire to

use it in commerce among the states." Mr. Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357.

South Carolina does not attempt to regulate the movement of the shrimp after they have been legally taken, packed and the stamp tax paid. The required packing in South Carolina and the payment of one-eighth cent per pound on shrimp taken in South Carolina waters does not unconstitutionally burden interstate commerce because neither the packing nor the stamping discriminates against interstate commerce (R. 57, 73 Fed. Supp. 378). No interstate transportation has commenced. Shrimp consumed in South Carolina and those destined to go to other states are taxed alike.

South Carolina could prohibit the shipment beyond the state of fish or shrimp taken in its waters by forbidding the possession of game for the purpose of transporting it beyond the state, even though interstate commerce might be "remotely affected." *Geer v. Connecticut*, 161 U. S. 519, 530; *People ex rel Silz v. Hesterberg*, 211 U. S. 31, 41; *Carey v. South Dakota*, 250 U. S. 118, 120; *Lacoste v. Department of Conservation*, 263 U. S. 545, 551; *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 426.

Distinguishable from these cases, and distinguished in the *Bayside case*, is *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, where the Court struck down a patent effort to interfere with interstate commerce in the processing and sale of shrimp. *Cf. Van Camp Seafood Co. v. Department of Natural Resources*, 30 Fed. (2d) 111.

Appellants' contention that the Fisheries Law is invalid because its enforcement touches not only shrimp caught in South Carolina waters but those caught outside the three-mile limit is sufficiently answered by the Court be-

low (R. 58, 73 Fed. Supp. 378) upon the authority of the *Bayside Fish Flour Co. case* and the decision of a three-Judge District Court of California in *Mirkovich v. Milnor*, 34 Fed. Supp. 409. Enforcement of this and many other laws would be ineffective if things beyond the State's right of direct control could not be collaterally affected. *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 320.

Appellants' contention that South Carolina cannot legally condition the licensing of a non-resident shrimp boat upon "proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year" is without merit. This requirement in Section 3379 is merely a method of enforcing the payment of the income tax due South Carolina under its general Income Tax Law (Section 2435, *et seq.* of the Code) by non-residents doing business in the state. State taxation of the income of a non-resident from business done within the taxing state is valid. *Shaffer v. Carter*, 252 U. S. 37.

EFFECT OF SHRIMP FISHERIES BEING BEYOND LOW WATER MARK

South Carolina by Section 3300 of its Code has declared its control over the ocean fisheries to extend to "three miles of any point along low water mark." This is the customary extent of a State's claim of sovereignty. The authorities which we have cited affirming the State's plenary right to control its fisheries and other wild life recognize the right as fully within the three-mile maritime belt as they do within the State's interior.

From *Manchester v. Massachusetts*, 139 U. S. 240, 258:

"The limits of the right of a nation to control the fisheries on its seacoast, and in the bays and arms of

the sea within its territory, have never been placed at less than a marine league from the coast on the open sea."

* * * *

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embeddied in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on their revenue, exercise an authority beyond this limit."

From *Louisiana v. Mississippi*, 202 U. S. 1, 52:

"The maritime belt is that part of the sea which, in contra-distinction to the open sea, is under the sway of the riparian states which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

In *The Abby Dodge*, 223 U. S. 166, 173, the Court construed a Federal statute prohibiting a certain type of sponge fishing in "the waters of the Gulf of Mexico or straits of Florida" as having no application to waters within the maritime belt of the State of Florida, holding that if the statute was construed to apply to fishing within that part of the ocean lying within Florida's territorial waters "the repugnancy of the Act to the Constitution would plainly be established by the decisions of this Court."[4]

[4] Citing *McCready v. Virginia*, 94 U. S. 391; *Manchester v. Massachusetts*, 139 U. S. 240.

Similarly in *Skiriotes v. Florida*, 313 U. S. 69, the Court upheld a Florida statute forbidding the use of diving apparatus for the taking of commercial sponges from the waters of the ocean within the maritime belt as established by Florida.

The acceptance of this view that a State may exercise control over the fisheries within its three-mile maritime belt answers the argument that the statute imposes a tax on imports.

EFFECT OF UNITED STATES V. CALIFORNIA

Unless the reasoning in *United States v. California*, 67 Sup. Ct. 1658, 91 L. Ed. 1414, requires a change in the law as to a State's right to control its fisheries, the cited decisions answer every point raised in the present appeal. As we read the California opinion, the principles of these decisions are not overruled but are distinguished from the principles upon which that decision was rested.

Superficially the argument might be made that since some of the decisions declaring a State's absolute right to control its fisheries refer to the State's "ownership" of its fisheries and other wild life, the holding in the *California case* that the State does not "own" the oil in the earth beneath the maritime belt is conclusive as to the "ownership" of the fisheries in the water. If "ownership" by the State is what is involved here as it was in the *California case*, it could be argued that there is a basic distinction between the ownership of wild life in the ocean within the three-mile limit and the ownership of oil and minerals beneath the earth's surface. Such a distinction is unnecessary because, despite the language of some of the decisions, a State's right to control its wild life does not rest upon the State's actual title to the fish and game.

When the authorities are closely read it appears that historically the ownership of animals *ferae naturae* lies in the people of the state with the State acting in its governmental capacity in directing their conservation for the benefit of all the people rather than in its capacity as a proprietor. The legal interest of each individual citizen in wild life within the borders of his state seems to lie within the property concept of a "negative community".[8] The people of a state own the wild animals therein and have a common right to take them but only under the conditions prescribed by the State, which, as a protector of the interests of all, is endowed with the governmental power of absolute control.

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[8] The historical basis of this concept is found in Mr. Justice White's opinion in *Geer v. Connecticut*, 161 U. S. 519. He traces the idea of public ownership of wild life and the state's right to control it from ancient time down to his day. It was the Roman law that "*animals ferae naturae* * * * having no owner, were considered as belonging in common to all the citizens of the state". (Digest, Book 41, Tit. 1, *De Adquir. Rer. Dom.*). He cites the *Institutes of Justinian* (Book 2, Tit. 1, Sec. 12) to the effect that as to game each citizen is "the owner in common with other citizens." He quotes Pothier, *Traite du Droit de Propriete*, No. 21, as classifying certain property rights as a "negative community of interests" as distinguished from a positive community such as a tenancy in common, and saying "as regards wild animals *ferae naturae*, they have remained in the ancient state of negative community." He quotes the Napoleon Code (Arts. 714, 715): "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." He refers to 1 St. Joseph Concordance 58 as stating that the same idea prevailed in Germany, Austria, and Italy. He makes lengthy quotations from Blackstone (2 Bl. Com. 1, 12, 14, 394, 410) upholding the doctrine of the people's common ownership of game, subject to whatever "royal prerogative" might have been claimed. Mr. Justice White ends his historical analysis by stating that the Government's right to control the exercise of the people's common ownership of wild life was vested in this country in the Colonial governments and "passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." (161 U. S. 528.) *Cf.*, upon the theory of the State's "ownership" of animals *ferae naturae*: *Missouri v. Holland*, 252 U. S. 416, 434; 14 Cornell L. Quart. 245; Pound, *An Introduction to the Philosophy of Law*, p. 198; *Borchard, Resources of the Continental Shelf*, 40 Am. J. Int. L. 53.

The people rather than the State hold title to animals *ferae naturae*. In the early case of *Corfield v. Coryell*, Federal Case No. 3230, 4 Wash. C. C. 371, it was said:

> "It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use."

From *Geer v. Connecticut*, 161 U. S. 519, 530:

> "The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of the state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own.
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> * * * *
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> "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose."

In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 209, the Court said that

> "* * * things which are *ferae naturae* belong to the 'negative community;' in other words, are public things to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600.
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> * * * *
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> "In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public

> property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two."

In *McCready v. Virginia*, 94 U. S. 391, 395, the Court said that the appropriation by the State of its tidewaters as a common for taking fish was "nothing more than a regulation of the use by the People of their common property. The right which the People of the state thus acquire comes not from their citizenship alone but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

From *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 11:

> "These and many other cases show that the state owns or has power to control the game and fish within its borders not absolutely or as proprietor for its own use or benefit, but in its sovereign capacity as representative of the people."

The State's right to control the wild life within its borders is the same whether the subject is shrimp in the sea, fish in the rivers, animals in the uplands, or birds in the air. The ownership of the soil on which or over which the animals roam is immaterial so far as the State's rights are concerned. At most, the owner of the land where animals *ferae naturae* are found has a qualified property interest in them by virtue of his right to exclude others from trespassing upon his land to take them.[6] Whatever rights he might thus have against other private claimants to the

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[6] *Cf. Gratz v. McKee*, 8 Cir., 270 F. 713 (Aff. 260 U. S. 127); *State v. Mallory*, 73 Ark. 236, 83 S. W. 955; *Realty Co. v. Johnson*, 92 Minn. 363, 100 N. W. 94; *State v. Horton*, 139 N. C. 588, 51 S. E. 945; Annotation, Ann. Cas. 1917-B, 958.

game are completely subject to the State's paramount right to control the taking of wild life belonging to its people.[7]

The claim of the State of California which this Court denied in *U. S. v. California* was based on title to the land beneath the ocean within the three-mile belt and therefore of the oil beneath. The interest in the oil lands claimed by the State was a fee-simple title capable of being sold and leased with profit to the State. A denial of this claim against the Federal Government, unconnected with any claim of common ownership by the people of the State as against outside private claimants, is far from a denial of the State's right to control for its citizens the fisheries within its jurisdiction.

The decision in the *California case* was "that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the State has paramount rights in and power over the belt, and incident to which is full dominion over the resources of the soil under that water area, including oil." An emphasis as to the narrow nature of the question decided is contained in the decree filed on 27 October, 1947, 92 L. Ed. 72.

The Court in the *California case* was careful to distinguish the authorities upon which we rely upon the ground that they were concerned only with the State's regulatory powers and did not involve the title to the land under the marginal sea. As to *Manchester v. Massachusetts*, the majority said: "That case involved only the power of Massachusetts to regulate fishing". *Louisiana v. Mississippi* "did not involve any dispute between the Federal and State Governments" and the extent of "the sway of the

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[7] Annotations: 56 A. L. R. 295; 89 L. R. A. 584; L. R. A. 1916-E, 523.

riparian states" over the maritime belt, referred to in that opinion, was not defined. "The opinion in [the *Abby Dodge*] was concerned with the State's power to regulate and conserve within its territorial waters, not with its exercise of the right to use and deplete resources which might be of national and international importance."

U. S. v. California refers to *Skiriotes v. Florida* as involving the same type of question and quotes Chief Justice Hughes' opinion:

> "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the (State) statute **so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting Federal legislation, is within the police power of the State.**"

We do not understand the *California case* as holding that the Federal Government has title to the lands within the three-mile belt, but even Federal ownership would not prohibit the States from controlling the fisheries within the water above those lands so long as the Congress does not enter that field of regulation. *Omaechevarria v. Idaho*, 246 U. S. 343.[8]

The Federal Government has made no effort to regulate shrimping within the three-mile maritime belt. Most of the authorities considering the State's right to control its fisheries within the three-mile ocean belt have in their declaration of such power inserted a saving provision that it is subject to the National Government's paramount right to regulate commerce. Any regulation or use of its resources by South Carolina must necessarily give way to an

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[8] See generally upon the State's exercise of police powers over Federally owned lands: *Colorado v. Toll*, 268 U. S. 228; *International Bridge Co. v. New York*, 254 U. S. 126; *McKelvey v. U. S.*, 260 U. S. 353; *Surplus Trading Co. v. Cook*, 281 U. S. 647; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Commission*, 302 U. S. 186.

incompatible regulation by the Government under one of its constitutional powers. If South Carolina's fishery regulations interfere with the Federal Government's control of commerce within the three-mile belt, or with its defense powers, or its dealings with foreign nations, the national interest would prevail. If some Federal interest attaches to the fisheries themselves, as it did to migratory birds under *Missouri v. Holland;* 252 U. S. 416, the State's right of control is superseded or modified.

There is in the present case no conflict between the State and the Federal Government. Neither Congress nor the Executive[9] has indicated any interest in controlling the fisheries. With the State's plenary powers of control explicit in the decisions of this Court, the Federal Government by silence has acquiesced in that control. It indicated in its contest with California over the oil in the submerged lands off California's shores that it had no intention of dislodging the power of the States to control fisheries. The Government's brief said (page 157): "Whether or not a state owns the fish within the marginal sea, its police power to regulate the means of taking them seems plain, at least in the absence of legislation by Congress". (Citing such cases as *Lawton v. Steele* and *Silz v. Hesterberg, supra*).

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[9] The difference in the attitude of the Executive Branch toward the oil lands beneath the ocean and the fisheries is demonstrated by the terms of two proclamations issued by President Truman on September 28, 1945; one, No. 2667, 10 F. R. 12303, announcing U. S. *jurisdiction and control* over "the natural resources of the sub-soil and sea bed of the continental shelf beneath the high seas, but contiguous to the coast of the United States", and the other, No. 2668, 10 F. R. 12304, dealing with coastal fisheries within the same ocean area, merely contemplating the establishment of "conservation zones". The executive orders complementing these proclamations are similar in purport. No. 9633, 10 F. R. 12305 places under the *jurisdiction and control* of the Secretary of the Interior the natural resources of the sub-soil and sea bed, while No. 9634, 10 F. R. 12305, provides that the Secretary of State and the Secretary of the Interior shall from time to time recommend the establishment of fishery conservation zones and provisions relating to their administration "pursuant to authority of law heretofore or hereafter provided."

II

SOUTH CAROLINA'S PURPOSE IS TO CONSERVE ITS FISH

If the State's right to control the taking of shrimp from its waters and to condition the taking by non-residents exists, the legislative motives in the exercise of that right are immaterial.[10] However, were South Carolina's purposes pertinent, they are legitimate efforts to conserve the State's fisheries for the benefit of South Carolinians.

The present Fisheries Law was largely enacted in 1924 (33 Stat. 1016); its forerunner was a 1906 Act (35 Stat. 85). The changes in the law since 1924 have taken the form of amendments to that statute now embraced in Sections 3299-3414 of the Code. The title of the 1924 Act was "An ACT to Protect and Preserve the Fish and to Encourage the Fishing Industries in the Tide Waters of the State; to Provide for the Regulating Thereof and the Revenue Therefrom, and for Other Purposes."

The original Act and its amendments lead to the conclusion that the State Legislature is vitally concerned with preserving for its citizens, of this and later generations, the resources of its fisheries and particularly those along its coast. Section 10 (Code 3309) authorizes the experimental propagation of shellfish with reports thereon to the General Assembly; Section 14 (Code 3313) requires a detailed record of the quantity and commercial value of each kind of fish taken, exported and consumed within the State, the number of persons engaged in the various branches of the fishing industries, their earnings "and any other matter or thing which to [the Board] may appear

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[10] *Sonzinsky v. U. S.*, 300 U. S. 506; *Fox v. Standard Oil Co.*, 294 U. S. 87; *Fernandez v. Wiener*, 326 U. S. 340; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381.

advisable"; Sections 32 (Code 3332) *et seq.*, provide for the leasing of oyster bottoms under close supervision to insure the proper propagation of oysters; for closed seasons for various fish; for the elimination of fishing methods destructive of the fish supply. In general, the purpose of the Act was to inaugurate and develop a conservation program.

The excerpts from the Annual Reports of the South Carolina Board of Fisheries (R. 37-48) show with what zeal the State officials are attempting to carry out the legislative purpose of conservation and to agree on a joint program with their neighboring states. In 1945 (R. 39-41) the Board reported to the General Assembly its fear that the supply of shrimp in South Carolina waters would not stand the increased trawling foreseen in the post-war years, particularly by non-residents, whose shrimping boats operating in South Carolina waters that year outnumbered those of residents. In 1945 a Joint Resolution of the General Assembly (44 Stat. 543) was passed creating a committee "to study coastal fishery laws." It was probably upon the advice of this Committee, and upon the warnings of the State Board of the impending danger to South Carolina shrimping by excessive trawling, that the 1947 amendment to the Fisheries Law providing for the distinction as to license fees between residents and non-residents was passed.

In the 1947 amendment the Legislature shows its purpose to reduce, though not to eliminate, the depletion of its shrimp supply by non-resident commercial fishermen. The method selected was a licensing system. The enforcement of the Fisheries Law is vastly more difficult in the case of non-resident fishermen than of residents, since the resident fishermen will normally bring their boats and their

catches into a South Carolina port while non-resident fishermen must be caught on the high seas by South Carolina Inspectors in order to make enforcement effective. It is therefore appropriate to require these non-resident licensees to pay more for their licenses than the residents pay. The 1946 report of the Fisheries Board (R. 48) describes the increased complexity of enforcing the shrimping law. It is even necessary to employ airplanes.

A revenue-raising measure made a part of a regulatory statute for the purpose of financing the regulatory features of the Act does not invalidate the Act even though interstate commerce is directly burdened by the tax. It is upon this theory that inspection fees are allowed if they bear any reasonable relation to the cost of enforcing the inspection or other regulation. *Texas Co. v. Brown*, 258 U. S. 466; *Phipps v. Cleveland Refining Co.*, 261 U. S. 449; *Standard Stock Food Co. v. Wright*, 225 U. S. 540; *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160; *Jewel Tea Co. v. Troy*, 80 Fed. (2d) 366. Cf. *Foote & Co. v. Stanley*, 232 U. S. 494.

There is no showing that the costs of enforcement of the South Carolina Fisheries Law as to non-resident fishermen are less than the license fees to be charged them. The annual reports of the State Board of Fisheries for the past five years (R. 48) show that the Board's revenues have never equaled its enforcement expenses.

Aside from the higher cost of enforcing the Fisheries Law in the case of non-residents, the South Carolina Legislature can be assumed to have acted upon the premise that a peculiar danger to the shrimp supply in South Carolina existed in the operations of non-resident commercial fishermen. The size of their boats, frequency of their visits to South Carolina waters, and the particular fishing meth-

ods, legal and illegal, which they use are all valid considerations for the Legislature. (R. 25-27, 29, 32-3, 36, 40, App. Br. 52.)

South Carolina showed that its purpose in the 1947 Act was one of conservation by limiting the number of out-of-State shrimping boats operating each season in South Carolina waters. In these one hundred licenses the statute directs that preference be given to non-residents who have fished in South Carolina for the longest number of years, such persons being of the class required to pay only a license fee of One Hundred and Fifty Dollars. It is obvious that had South Carolina been desirous of passing a revenue measure it would have given preference to the Twenty-five Hundred Dollar applicants.

Non-resident fishermen who in the past have operated in South Carolina waters and taken shrimp belonging exclusively to the citizens of the State purely at the sufferance of South Carolina have no grounds of complaint when the State "as a proper conservation measure" requires of them "a license fee so high as to limit their number and to reimburse the people of the State in some measure for the loss sustained by them from the fishing of those who are licensed." (R. 57.)

III

APPELLANTS SHOW NO IRREPARABLE INJURY

Appellants have shown no irreparable damage sufficient to justify a Federal Court of Equity enjoining the enforcement of State criminal laws. Appellants' original petition alleged that their boats were in danger of confiscation if they were operated in South Carolina waters in violation of the Fisheries Law (R. 5, 6). They now agree (R. 29) that no confiscation of appellants' boats or equip-

ment will take place. Appellants' claim of "irreparable damage" is that as a class they will be subjected to a multiplicity of criminal proceedings and that their private businesses will be disrupted to their financial loss. Such a showing is not sufficient to justify injunctive relief. *American Federation of Labor v. Watson*, 327 U. S. 582; *Spielman Motor Sales Corp. v. Dodge*, 295 U. S. 89; *Beal v. Missouri-Pacific R. Corp.*, 312 U. S. 45; *Douglas v. Jeanette*, 319 U. S. 157.

The applicable principles are well stated by the late Chief Justice in his dissent in *American Federation of Labor v. Watson*:

> "A criminal prosecution or other litigation conducted in state courts by a state official, within the scope of his authority as such, may, it is true, cause apprehension on the part of those who are alleged to be law-breakers. Such apprehensions and those of others may lead to changes in business practices to the injury of the alleged lawbreakers. But the conduct of such proceedings, in good faith and in conformity to law, is not actionable at law or in equity. Damage or loss to one's business or pocketbook, resulting from such proceedings, is but an incident to the necessary performance of a public function of state government. It is *damnum absque injuria*." (Citing cases.)
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> "It is not enough to show that the injury to appellants is only that which is a normal incident of the state's assertion of its authority to enforce its laws. No person is immune from any good faith prosecution by the state for his unlawful acts. Neither the imminence of the prosecution nor the incidental injury which may flow from it is a ground for equity relief, since the constitutionality of the statute may be ascertained by the proceeding in the state courts with appellate review by this Court, as readily as by a suit in the federal courts." (Citing cases.)
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> * * * *

"Hence the arrest by federal courts of the processes of the civil or criminal law of the state, and the determination of questions of civil or criminal liability under state law, must be predicated not only upon a showing of unlawful or unconstitutional action on the part of the state, but upon some showing of a resulting immediate and irreparable injury which can be avoided or prevented only by the federal court's transferring the trial of the state questions from the state courts to itself. *Douglas v. Jeannette, supra* (319 U. S. 164, 87 L. Ed. 1329, 63 S. Ct. 877, 882)."

Ten of the twelve boats owned by the plaintiff Toomer have been fishing in South Carolina waters throughout the 1947 season by the simple expedient of having them transferred to a South Carolina corporation of which he is president (Stipulation No. 6, R. 29). Are non-resident plaintiffs irreparably damaged by high license fees when they can obtain the advantages of lower priced resident licenses by transferring their boats to South Carolina corporations which can be formed at nominal expense?

The conduct of these appellants in making a practice of violating the South Carolina Fisheries Law has been such that equitable relief should be denied. Their petition admits (R. 3, 5) that they made no attempt to obey the law during the 1947 fishing season, have fished in South Carolina waters in disregard of the law, as a result of which warrants for such violations have been issued against them, which warrants they have avoided.

The evidence discloses (R. 25-7, 29, 32-3, 36) that as to provisions of the South Carolina Law connected and unconnected with the portions now challenged, plaintiffs are habitual lawbreakers. Twice during 1947 DeGracia has pled guilty in the South Carolina Courts to shrimping out of season. Collins and Davies pled guilty in the Beaufort General Sessions Court to the same offense on June 3, 1947.

The same Court issued a Bench Warrant for the arrest of Cesaroni for a similar offense on June 3, 1947, and Cesaroni was convicted of other such offenses in 1940 and 1943, and three times in 1945. Toomer was charged with violating the statute against fishing out of season on November 14, 1938, forfeiting his appearance bond, and was convicted of violating the fisheries laws on August 28, 1945. Thus three of the individual plaintiffs have pled guilty to out-of-season shrimping in South Carolina waters this year, and the other two have records of similar offenses in prior years. This flagrant disregard of South Carolina's Fisheries Law shows that these plaintiffs are not entitled to equitable relief and demonstrates that South Carolina has ample reason to make a particular classification of non-resident fishing operations.

Another consideration in view of the requirement that appellants' "irreparable injury" must be "imminent", is that the only provision of South Carolina law that is new is the amendment to Sec. 3379 of the Code increasing the scale of license fees for shrimping. Sec. 3414, requiring fishermen to bring their catch into a South Carolina port, has been in effect since 1936. Most of the other provisions of the Fisheries Law go back to 1924 and 1925. The appellants have either obeyed the law in past years without any great injury, or violated it with impunity.

CONCLUSION

The Court below properly followed the established principle that a State has the right to control the fisheries within its jurisdiction and to establish different conditions for the fishing of its waters by residents and non-residents.

Respectfully submitted,

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PERTINENT SOUTH CAROLINA CODE SECTIONS

Section 3300

Jurisdiction.—The waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low water mark on the coast thereof, not heretofore conveyed by grant from the Legislature or lawful compact with the State, shall continue and remain as a common for the people of the State for the taking of fish, subject to the provisions of §§ 3299 thru 3412 and any future act that may be passed: *provided,* the provisions of §§ 3299 thru 3412 shall not apply to fish or fishing in the fresh waters of this State.

Section 3301

Jurisdiction of state board of fisheries.—The state board of fisheries shall have and retain jurisdiction over all salt water fish, fishing and fisheries, and all fishing, fish and fisheries in all tidal waters of the State and all fish, fishing and fisheries in all waters of the State whereupon a tax or license is levied for reason of commercial purposes. This includes the following: all shellfish, crustaceans, diamond back, terrapin, sea turtles, porpoises, shad, sturgeon, rock, herring, and all other migratory fish.

Section 3308

Board to enforce laws.—It shall be the duty of the board of fisheries to impartially enforce all laws pertaining to fish and fisheries.

Section 3313

Records of board.—The records and documents in the office of the board shall include a record of leases granted for bottoms for the propagation of shellfish and the subsequent changes of ownership, the particulars and amounts of all licenses and permits of every kind issued; a tabulated

record of the quantity of each kind of fish taken in the waters of the State and the commercial value thereof, the amount exported and the amount consumed within the State; the number of men engaged in the various branches of the fishing industries and their approximate earnings and any other matter or thing which to them may appear advisable; all of which records shall be at all times open for inspection by the Governor or Comptroller General and their accredited agents.

Section 3315

Collection of Revenues—prosecution of violations—employment of special prosecutors.—It shall be the duty of the board to enforce all laws for collection of revenues due the State from the fishing industries and leases of bottoms; and they shall require the inspectors to report to them from time to time all violations coming within their knowledge and the board is authorized to prosecute for violations of said laws when in their judgment such prosecutions are for the best interests of industries or of the State and to that end employ counsel having special knowledge of the fisheries laws and of the matters pertaining to fisheries and coastal conditions to work up and conduct such prosecutions in the inferior courts and to assist the solocitor in the court of general sessions and Supreme Court should he desire such assistance.

Section 3374

Scale of fisheries' tax.—The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit: on each sixty ounces of canned oysters two cents; on every gallon of shucked oysters five cents; on every bushel of clams in the shell ten cents; on each bushel of oysters in the shell ten cents; on each terrapin (during the open season) five cents; on soft crabs, two cents per dozen; hard crabs, ten cents per bushel; on crab meat, two cents per gallon, shrimp, when cooked, one cent for each sixty ounces or fraction thereof; on each pound of green shrimp, one-eighth of one cent. *Provided*, that an impose tax of five (5) cents shall

be put upon each white shad and two (2) cents upon each hickory shad offered for sale, or shipped from any point in the state to any point within or without the state: *Provided,* that the license tax on raw oysters shall be five cents per gallon whether sold to local consumers or otherwise, and where said oysters are sold in less than gallon lots; a tax stamp shall be affixed at the rate of five cents per gallon. *Provided,* that a like tax on all shad imported into the State shall be subject to the same tax as herein provided before the same may be offered for sale. *Provided, further,* that there is hereby imposed a tax of two (2¢) cents on each sixty ounces of canned clams and five (5¢) cents per gallon on raw shucked clams.

Section 3408

Closed season on shrimp—commercial fisheries license —terrapin farms.—There shall be a closed season on shrimp or prawn, beginning on the 1st day of March and ending on the 30th day of June each calendar year. Any person, firm or corporation violating said closed season shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than $100.00 nor more than $300.00 or by imprisonment of not less than thirty days nor more than ninety (90) days or both fine and imprisonment, in the discretion of the court. In addition to such punishment all boats, rigging, and equipment used in any violation of said closed season shall be seized and forfeited under the provisions of section 3403, 1932 Code.

The closed season hereby created and declared shall not apply to cast nets, or shrimp caught in same, for personal use.

There shall be license to run terrapin farms, which license shall be $25.00 each calendar year. Such license to be obtained as heretofore provided for.

No commercial fishery of any nature not provided for in the Coastal Fisheries Law shall commence operations unless first obtaining a license to do so from the board of fisheries and said license unless otherwise provided for shall cost $1.00 per annum, and be obtained as heretofore

provided for. There shall be a license to buy and ship clams, such license shall be obtained as heretofore provided for and shall be $5.00 per annum, good only for the open season for clam.

Section 3410

Trawling for shrimp.—The trawling for shrimp in any stream, bay, sound or river within this State is hereby prohibited. *Provided,* that during the existence of the present war in which the United States of America is engaged and for six months following thereafter the trawling for shrimp shall be permitted in any sound in Beaufort County.

Any person, firm or corporation violating the terms of this section, upon conviction, shall be fined not more than one hundred ($100.00) Dollars or imprisoned not more than thirty days.

Section 3414

Licensed shrimp trawlers unload and pack and stamp shrimp before shipping or transporting shrimp out of State.—All boats licensed by this State to trawl for shrimp in the waters of the State of South Carolina shall land or dock at some point in South Carolina, and shall unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another State or the waters thereof. Any person, firm or corporation violating the provisions of this section shall upon conviction thereof be fined not exceeding five hundred ($500.00) Dollars or imprisoned not exceeding one year, or both in the discretion of the court.

This section shall be a part of the coastal fisheries law, and any equipment or property used in the violation of any of the provisions of this section shall be confiscated, as provided for in section 3404, 1932 Code.

Act No. 281 of 1947 Acts (44 Stat. 576).

SECTION 1: § 3379, 1942 Code, amended—shrimp boat licenses—schedule.—That Section 3379, Code of Laws of South Carolina, 1942, be and the same is hereby, amended by inserting after the words "South Carolina" on line 3

thereof the following: "and the below listed licenses are hereby levied annually upon shrimp boats owned by non-residents of this State and shrimp boats owned by residents of this State"; and by adding at the end of said Section the following: All owners of shrimp boats who are residents of the State of South Carolina, shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) Dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years shall take out a license for each boat owned by him and said license shall be One hundred and fifty ($150.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years shall take out a license for each boat owned by him and said license shall be Two Thousand five hundred ($2,500.00) dollars per year", so that said Section when so amended shall read as follows:

Section 3379. The following license tax is hereby levied annually upon the different fishing appliances except sturgeon nets, used in the waters of South Carolina and the below listed licenses are hereby levied annually upon shrimp boats owned by non-residents of this State and shrimp boats owned by residents of this State: anchor gill nets, stake gill nets and drift gill nets, twenty-five (25¢) cents for each one hundred (100) yards or fraction thereof. Trap nets, floating, one dollar and fifty ($1.50) cents each. Submerged trap nets, three ($3.00) dollars each. Shrimp trawl nets five ($5.00) dollars each. For any apparatus used and not above enumerated other than cast nets and hook and line, the license shall be the same as that provided for the apparatus or appliance which it most resembles. All owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South

Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One Hundred and fifty ($150.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years, shall take out a license for each boat owned by him and said license shall be Two Thousand five hundred ($2,500.00) dollars per year."

SECTION 2: Nonresident licenses—number limited.—That the State Board of Fisheries shall not grant non-resident licenses to operators of shrimp boats on and after July 1, 1947, in excess of one hundred (100) per year. That in granting licenses to non-resident shrimp boats, the State Board of Fisheries is to give preference to issuance of licenses to those non-resident boats that have been fishing in South Carolina for the longest number of years; *Provided, however,* That application for licenses by such boats, or the operators of such boats be made on or before June 1st of the respective year. If, by June 1st of a respective year, the Board of Fisheries has not granted one hundred (100) licenses to the operators of non-resident shrimp boats, which have operated in South Carolina for the longest number of years, then the Board of Fisheries may grant such licenses to any applicant thereafter until the number of one hundred (100) licenses have been issued.

SECTION 3: Nonresidents pay state income taxes before being licensed.—The Board of Fisheries, before issuing any non-resident licenses in the year 1948 and thereafter, shall require proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year.

SECTION 4: Revoke Licenses.—It is mandatory upon the State Board of Fisheries to revoke immediately, and have its designated Inspector take up, any license issued to a resident or non-resident operator of a shrimp boat upon conviction of any violation of any of the fishing laws,

to-wit: First offense, ten days; second offense, thirty days; third offense, one year.

SECTION 5: Disposition of fines and forfeitures from coastal fisheries laws—issuance of licenses to nonresidents.—All fines and forfeitures for the violation of any of the Coastal Fisheries Laws shall be paid to the Treasurer of the County in which the violation occurs, if, and only if, the case of violation of said Fisheries Laws is brought by an officer of the State or County other than an inspector for the Board of Fisheries. Provided that no license shall be granted to residents of a state if under the laws of that state licenses to trawl for shrimp in that state at the same or less license fee are not granted to South Carolinians applying therefor.

SECTION 6: Repeal.—All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 7: Time effective.—This Act shall take effect upon its approval by the Governor.

Approved the 19 day of May, 1947.

84 2, 3, 5, 7, 8, 9, 14, 15

SUPREME COURT OF THE UNITED STATES

No. 415.—October Term, 1947.

Earle J. Toomer, et al., Appellants, v. J. M. Witsell, et al.	Appeal from the United States District Court for the Eastern District of South Carolina.

[June 7, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This is a suit to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. Appellants, who initiated the action, are five individual fishermen, all citizens and residents of Georgia, and a non-profit fish dealers' organization incorporated in Florida. Appellees are South Carolina officials charged with enforcement of the statutes.

The three-judge Federal District Court which was convened to hear the case [1] upheld the statutes, denied an injunction and dismissed the suit.[2] On direct appeal from that judgment [3] we noted probable jurisdiction.

The fishery which South Carolina attempts to regulate by the statutes in question is part of a larger shrimp fishery extending from North Carolina to Florida.[4] Most of the shrimp in this area are of a migratory type, swimming

[1] The court was convened pursuant to § 266 of the Judicial Code, 28 U. S. C. § 380.

[2] 73 F. Supp. 371 (1947).

[3] The appeal is authorized by § 266 of the Judicial Code, 28 U. S. C. § 380.

[4] See Johnson and Lindner, *Shrimp Industry of the South Atlantic and Gulf States* (U. S. Dept. of Commerce, Bureau of Fisheries Investigational Rep. No. 21, 1934); Annual Rep. of S. C. State Board of Fisheries (1946).

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BRIEF FOR APPELLEES

Supreme Court of the United States

OCTOBER TERM, 1947

No. 415

EARLE J. TOOMER, JOSEPH A. CESARONI, JOSEPH DeGRACIA, *ET AL.*, APPELLANTS

versus

J. M. WITSELL, EDWARD E. BURROUGHS, E. L. SWEAT, *ET AL., ETC.*, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

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south in the late summer and fall and returning northward in the spring. Since there is no federal regulation of the fishery, the four States most intimately concerned have gone their separate ways in devising conservation and other regulatory measures. While action by the States has followed somewhat parallel lines, efforts to secure uniformity throughout the fishery have by and large been fruitless.[5] Because of the integral nature of the fishery, many commercial shrimpers, including the appellants, would like to start trawling off the Carolinas in the summer and then follow the shrimp down the coast to Florida. Each State has been desirous of securing for its residents the opportunity to shrimp in this way, but some have apparently been more concerned with channeling to their own residents the business derived from local waters. Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States.[6]

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[5] At least three of the States (Florida, Georgia, and South Carolina) belong to the Atlantic States Marine Fisheries Commission, one of the principal aims of which is to secure the enactment of uniform fisheries laws. The Commission was established pursuant to an interstate compact which has been ratified by at least thirteen eastern States. Its duties, however, are largely consultive and advisory, and to date its efforts have produced little in the way of concrete results insofar as the South Atlantic shrimp fishery is concerned. See 56 Stat. 267 (1942); Fla. Stat. Ann. § 374.43 (Supp. 1946); Ga. Code Ann. § 45–1001 *et seq.* (Supp. 1947); S. C. Code Ann. (1944 Supp.) § 1776–1; Annual Rep. of the S. C. State Board of Fisheries (1943); *id.* (1944); *id.* (1945); *id.* (1946).

[6] See Fla. Stat. Ann. § 374.14 (3) (Supp. 1946), as amended by 1947 Gen. Laws of Fla., Act 163; Ga. Code Ann. § 45–216, 45–217 (1937); N. C. Gen. Stat. Ann. § 113–238, as amended 1947 Session Laws of N. C., c. 256; S. C. Acts of 1947, Act 281, §§ 1, 2, 5. See

South Carolina forbids trawling for shrimp in the State's inland waters,[7] which are the habitat of the young shrimp for the first few months of their life. It also provides for a closed season in the three-mile maritime belt during the spawning season, from March 1 to July 1.[8] The validity of these regulations is not questioned.

The statutes appellants challenge relate to shrimping during the open season in the three-mile belt: Section 3300 of the South Carolina Code provides that the waters in that area shall be "a common for the people of the state for the taking of fish."[9] Section 3374 imposes a tax of ⅛¢ a pound on green, or raw, shrimp taken in those waters.[10] Section 3379, as amended in 1947, requires payment of a license fee of $25 for each shrimp boat owned by a resident, and of $2,500 for each one owned by a non-resident.[11] Another statute, not integrated in the Code, conditions the issuance of non-resident licenses

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also statements by the S. C. State Planning Board that "In revising these [shrimp] laws . . . non-resident licenses [should be] placed on a par or reciprocal basis with those of other states in the South Atlantic group" and "Under existing regulations our fishermen are discriminated against." S. C. State Planning Board Bull. No. 14, p. 59 (1944).

[7] S. C. Code Ann. § 3410 (Supp. 1944).

[8] S. C. Code Ann. § 3408.

[9] "The waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low water mark on the coast thereof, not heretofore conveyed by grant from the Legislature or lawful compact with the State, shall continue and remain as a common for the people of the State for the taking of fish. . . ."

[10] "The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit . . . on each pound of green shrimp, one-eighth of one cent. . . ."

[11] Prior to 1947 there was imposed on resident and non-resident shrimpers alike a boat tax of $1.50 per ton; a personal license tax of $5; and a tax of $5 for each shrimp trawl net. S. C. Code Ann. §§ 3375, 3376, 3379. These taxes, with the possible exception of

for 1948 and the years thereafter on submission of proof that the applicants have paid South Carolina income taxes on all profits from operations in that State during the preceding year.[12] And § 3414 requires that all boats licensed to trawl for shrimp in the State's waters dock at

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§ 3375 imposing a boat tax graduated by tonnage, apparently remain in effect and, in addition, § 3379 was amended as follows:

". . . All owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One hundred and fifty ($150.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina and who have not had one or more boats licensed during each of the past three years, shall take out a license for each boat owned by him and said license shall be Two thousand five hundred ($2,500.00) dollars per year." S. C. Acts of 1947, Act 281, § 1.

The appellants cannot qualify for $150 licenses and hence are subject to the $2,500 provision. As introduced in the legislature and passed by the South Carolina House of Representatives, the bill to amend § 3379 did not contain the $150 provision. That provision was inserted by amendment in the Senate at the instance of a senator from Beaufort County, which is the coastal county adjoining Georgia. See House Bill 555; Senate Bill 576; Senate Journal No. 69, May 9, 1947, pp. 53–5; Charleston News and Courier, May 17, 1947, p. 1, cols. 2–3.

Other parts of the same 1947 statute, not attacked in this case, limit to 100 the number of non-resident boats which may be licensed and forbid altogether the issuance of licenses, even on payment of the $2,500 fee, to residents of States which do not grant licenses to fish in their waters to South Carolina residents at the same or a lower fee. *Id.* §§ 2, 5.

[12] "The Board of Fisheries, before issuing any non-resident licenses in the year 1948 and thereafter, shall require proof that the owner of the non-resident boat has paid all income taxes due to the State of South Carolina for profits made from operations in South Carolina during the preceding year." *Id.* § 3.

a South Carolina port and unload, pack, and stamp their catch "before shipping or transporting it to another state or the waters thereof." [13] Violation of the fishing laws entails suspension of the violator's license as well as a maximum of a $1,000 fine, imprisonment for a year, or a combination of a $500 fine and a year's imprisonment.[14]

First. We are confronted at the outset with appellees' contention, rejected by the District Court, that injunctive relief is inappropriate in this case, regardless of the validity of the challenged statutes, since appellants failed to show the imminence of irreparable injury and did not come into court with clean hands.

As to the corporate appellant, we agree with the appellees that there has been no showing that enforcement of the statutes would work an irreparable injury. The record shows only that the corporation is an association of fish dealers and that it operates no fishing boats. Indeed, neither the record nor the appellants' brief sheds any light on how the statutes affect the corporation, let alone how their enforcement will cause it irreparable injury. Under such circumstances, the corporation has no standing to ask a federal court to take the extraordinary step of restraining enforcement of the state statutes. The remainder of this opinion will therefore be addressed to the individual appellants' case.

As to them, it is agreed that the appellees were attempting to enforce the statutes. It is also clear that compliance with any but the income tax statute would have

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[13] All boats licensed by this State to trawl for shrimp in the waters of the State of South Carolina shall land or dock at some point in South Carolina, and shall unload their catch of shrimp, and pack and properly stamp the same before shipping or transporting it to another State or the waters thereof. . . ." The stamping refers to tax stamps.

[14] S. C. Acts of 1947, Act 281, § 4; S. C. Code Ann. §§ 3407, 3414.

required payment of large sums of money for which South Carolina provides no means of recovery, that defiance would have carried with it the risk of heavy fines and long imprisonment, and that withdrawal from further fishing until a test case had been taken through the South Carolina courts and perhaps to this Court would have resulted in a substantial loss of business for which no compensation could be obtained. Except as to the income tax statute, we conclude that appellants sufficiently showed the imminence of irreparable injury for which there was no plain, adequate and complete remedy at law.[15]

Appellants' position on the income tax statute[16] is that it is unconstitutional for South Carolina to require Georgia residents to pay South Carolina income taxes on profits made from operations in South Carolina waters. Another South Carolina statute, however, permits any taxpayer who believes a tax to be "illegal for any cause" to pay the tax under protest and then sue in a state court to recover the amounts so paid.[17] In the absence of any showing by appellants that they could not take advantage of this procedure to raise their constitutional objections to the tax, we cannot say that they do not have an adequate remedy at law.

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[15] Appellees stress *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946). We think the doctrine of that case applicable to one of the arguments made against § 3374, *supra* note 10. See the third division of this opinion, *infra* p. —. As to all the other statutes except that relating to state income taxes, however, we agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts.

[16] See note 12 *supra*.

[17] S. C. Code Ann. § 2469. This section provides that a taxpayer may institute suit to recover the amounts paid within thirty days of the payment under protest. See *Argent Lumber Co.* v. *Query*, 178 S. C. 1, 5, 182 S. E. 93, 94 (1935).

Some of the individual appellants had previously been convicted of shrimping out of season and in inland waters. The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree.

Second. The appellants too press a contention which, if correct, would dispose of the case. They urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark. In the court below *United States* v. *California*, 332 U. S. 19 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida*, 313 U. S. 69, 75 (1941), that "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the [State] statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State.*" [18]

Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery.[19]

[18] 332 U. S. 19, 38 (1947).

[19] Appellants also contend that until 1924 South Carolina had itself limited its boundaries by the low-water mark and had asserted no power over the maritime belt. But, as the District Court held, the statute cited by appellants need not be given the effect which they would attribute to it, and even if it were so construed, it did not impose a constitutional limit on the power of future legislatures.

It does not follow from the existence of power to regulate, however, that such power need not be exercised within the confines of generally applicable Constitutional limitations. In the view we take, the heart of this case is whether South Carolina's admitted power has been so exercised. We now proceed to various aspects of that problem.

Third. Appellants contend that § 3374,[10] which imposes a tax of ½¢ a pound on green shrimp taken in the maritime belt, taxes imports and unduly burdens interstate commerce in violation of §§ 8 and 10 of Art. I of the Constitution. We agree with the court below that there is no merit in this position.

Since South Carolina has power to regulate fishing in the three-mile belt, at least where ~~no federal claim to do so is made~~ the federal government has made no conflicting assertion of power, fish caught in that belt cannot be considered "imports" in a realistic sense of the word. Appellants urge, however, that the tax is imposed on shrimp caught outside, as well as within the three-mile limit. On its face the statute has no such effect, and appellants call our attention to no South Carolina decision so interpreting it. Since we do not have the benefit of interpretation by the State courts and since this suit for an injunction does not present a concrete factual situation involving the application of the statute to shrimping beyond the imaginary three-mile line, it is inappropriate for us to rule in the abstract on the extent of the State's power to tax in this regard.[11]

Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp,

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[10] See note 10 *supra*.

[11] See *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946); cf. *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947).

occurs before the shrimp can be said to have entered the flow of interstate commerce.[22]

Fourth. Appellants' most vigorous attack is directed at § 3379[23] which, as amended in 1947, requires non-residents of South Carolina to pay license fees one hundred times as great as those which residents must pay. The purpose and effect of this statute, they contend, is not to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents. As such, the statute is said to violate the privileges and immunities clause of Art. IV, § 2, of the Constitution and the equal protection clause of the Fourteenth Amendment.

Article IV, § 2, so far as relevant, reads as follows:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.[24] For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.[25]

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[22] See *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284 (1927); *Lacoste* v. *Dept. of Conservation*, 263 U. S. 545 (1924); *Oliver Iron Co.* v. *Lord*, 262 U. S. 172 (1923); *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922); *Coe* v. *Errol*, 116 U. S. 517 (1886).

[23] See note 11 *supra*.

[24] See *Paul* v. *Virginia*, 8 Wall. 168, 180–81 (1868); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 78 (1920).

[25] *Travis* v. *Yale & Towne Mfg. Co.*, *supra* note 24, at 82.

"Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1868).

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.[26]

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.[27] The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

With these factors in mind, we turn to a consideration of the constitutionality of § 3379.

By that statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its

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[26] *Ward* v. *Maryland*, 12 Wall. 418 (1870); see also *Chalker* v. *Birmingham & N. W. R. Co.*, 249 U. S. 522 (1919); *Shaffer* v. *Carter*, 252 U. S. 37, 52–53 (1920).

[27] See *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 79 (1920).

practical effect is virtually exclusionary.[28] This the appellees do not seriously dispute. Nor do they argue that since the statute is couched in terms of residence it is outside the scope of the privileges and immunities clause, which speaks of citizens. Such an argument, we agree, would be without force in this case.[29]

As justification for the statute, appellees urge that the State's obvious purpose was to conserve its shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements.[30] But in any event,

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[28] The parties stipulated that in 1946, the year before non-residents had to pay higher fees than residents, 100 non-resident boats were licensed and that in 1947 only 15 such boats were licensed. Even those 15 were presumably owned by persons who had fished in South Carolina waters the three preceding years and were thus eligible for $150 licenses, since the appellees conceded on oral argument here that no $2,500 licenses had been taken out. See note 11 *supra*.

[29] See *Blake* v. *McClung*, 172 U. S. 239, 247 (1898); *Chalker* v. *Birmingham & N. W. R. Co.*, 249 U. S. 522 (1919); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 79 (1920).

[30] It is relevant to note that the statute imposes no limitation on the number of resident boats which may be licensed, and it was stipulated that while the number of non-resident boats fell from 100 to 15 between 1946 and 1947, the total number of boats licensed increased during that time from 254 to 271.

The reports of the State Board of Fisheries for several years back, while expressing solicitude as to the need for conservation measures, reveal equal concern with methods for increasing the market for shrimp—by advertising, air shipments, etc.—and contain frequent references to the economic importance of the shrimp industry to the State. The 1945 report, for example, said that "The shrimp business in our State is quite an industry, it employs numbers of men and boat crews spend large sums of money on repairs, gasoline, oil and food besides the money that is spent by the individuals personally." In connection with the possibility of air shipments to large consuming centers such as New York, the same report said that air transportation "should increase the consumption of same [i. e., seafoods] in large quantities; it will also create a much greater demand for shrimp and seafoods all over the universe, and it will place them

appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

In this connection appellees mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. One statement in the appellees' brief might also be construed to mean that the State's conservation program for shrimp requires expenditure of funds beyond those collected in license fees—funds to which residents and not non-residents contribute. Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries,[31] to graduate license fees according to the size

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in sections where they are very seldom consumed with the result that many more people will get sold on the idea of eating same." And the 1946 report's section on shrimp concluded with the statement that "To be able to make this report is certainly a pleasure to the State Board of Fisheries as we are able to show that the catch of shrimp this season was nearly twice as large as in the previous year."

[31] See Fla. Stat. Ann. § 374.14 (5) (Supp. 1946); 1947 Gen. Laws of Fla., Act 654; Ga. Code Ann. § 45–109 (1937); Johnson and Lindner, *Shrimp Industry of the South Atlantic and Gulf States* (U. S. Dept. of Commerce, Bureau of Fisheries Investigational Rep. No. 21, 1934) 62–63.

of the boats,[32] or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.

Thus, § 3379 must be held unconstitutional unless commercial shrimp fishing in the maritime belt falls within some unexpressed exception to the privileges and immunities clause.

Appellees strenuously urge that there is such an exception. Their argument runs as follows: Ever since Roman times, animals *ferae naturae*, not having been reduced to individual possession and ownership, have been considered as *res nullius* or part of the "negative community of interests" and hence subject to control by the sovereign or other governmental authority. More recently this thought has been expressed by saying that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this "ownership" for the benefit of its citizens. In the case of fish, it has also been considered that each government "owned" both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must also "own" the fish within those waters. Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest. Finally, it is said that this special property interest, which nations and similar governmental bodies have tradi-

[32] South Carolina has itself imposed such a graduated tax in years past. S. C. Code Ann. § 3375 (1942). See also Ga. Code Ann. § 45–210 (1937); N. C. Gen. Stat. Ann. § 113–165 (Supp. 1945).

tionally had, in this country vested in the colonial governments and passed to the individual States.

Language frequently repeated by this Court appears to lend some support to this analysis.[33] But in only one case, *McCready* v. *Virginia*, 94 U. S. 391 (1876), has the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination.[34] In that case the Court sanctioned a Virginia statute applied so as to prohibit citizens of other States, but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. The right of Virginians in Virginia waters, the Court said, was "a property right, and not a mere privilege or immunity of citizenship." And an analogy was drawn between planting oysters in a river bed and planting corn in state-owned land.

It will be noted that there are at least two factual distinctions between the present case and the *McCready* case

[33] The most extended exposition appears in the majority opinion in *Geer* v. *Connecticut*, 161 U. S. 519 (1896).

[34] Appellees rely also upon *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914), and *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510 (1924). The *Patsone* case involved a 1909 Pennsylvania statute forbidding resident aliens to kill game or to possess firearms useful for that purpose. On the record before it, the Court concluded that it could not say that the Pennsylvania legislature was not warranted in assuming that resident aliens were at that time "the peculiar source of the evil that it desired to prevent." The statute was therefore held not to violate the Fourteenth Amendment. But the theory of the case was that there was a substantial reason for the discrimination beyond the mere fact of alienage. The *Haavik* case involved the validity, under an Act of Congress, of an Alaskan statute imposing on non-residents, but not residents, a $5 fishing license fee. In upholding the statute the Court pointed out that "We are not here concerned with taxation by a State." And in considering the power of Congress to authorize such a tax, it was added that the fee was a reasonable contribution toward the protection which the local government afforded to non-residents.

First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily. Secondly, the *McCready* case involved regulation of fishing in inland waters, whereas the statute now questioned is directed at regulation of shrimping in the marginal sea.

Thus we have, on the one hand, a single precedent which might be taken as reading an exception into the privileges and immunities clause and, on the other, a case which does not fall directly within that exception. Viewed in this light, the question before us comes down to whether the reasons which evoked the exception call for its extension to a case involving the factual distinctions here presented.

However satisfactorily the ownership theory explains the *McCready* case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. That the shrimp are migratory makes apposite Mr. Justice Holmes' statement in *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920), that "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of any one; and possession is the beginning of ownership." Indeed, only fifteen years after the *McCready* decision, a unanimous Court indicated that the rule of that case might not apply to free-swimming fish.[35] The fact that it is activity in the three-mile belt which the South Caro-

[35] *Manchester* v. *Massachusetts*, 139 U. S. 240, 265 (1891). In that case appellant, a citizen of Rhode Island, was convicted of violating a Massachusetts statute which regulated fishing in Buzzard's Bay. The Court upheld Massachusetts' power to enact the regulation, but pointed out that the statute "makes no discrimination in favor of citizens of Massachusetts and against citizens of other States." *Ibid.*

lina statute regulates is of equal relevance in considering the applicability of the ownership doctrine. While *United States* v. *California*, 332 U. S. 19 (1947), as indicated above, does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired "ownership" of the three-mile belt.[36]

The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.[37] And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

These considerations lead us to the conclusion that the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case.

Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause. And since we have previously concluded that the reasons advanced in support of the statute do not bear a reasonable relationship to the high degree of discrimination practiced upon citizens of other States, it follows that § 3379 violates Art. IV, § 2, of the Constitution.

Appellants maintain that by a parity of reasoning the statute also contravenes the equal protection clause of

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[36] 332 U. S. 19, 31.

[37] See, *e. g.*, Pound, *An Introduction to the Philosophy of Law*, 197–202. The fiction apparently gained currency partly as a result of confusion between the Roman term *imperium*, or governmental power to regulate, and *dominium*, or ownership. Power over fish and game was, in origin, *imperium*. *Ibid.*

the Fourteenth Amendment. That may well be true, but we do not pass on this argument since it is unnecessary to disposition of the present case.

Fifth. Appellants contend that § 3414,[38] which requires that owners of shrimp boats fishing in the maritime belt off South Carolina dock at a South Carolina port and unload, pack, and stamp their catch (with a tax stamp) before "shipping or transporting it to another state," burdens interstate commerce in shrimp in violation of Art. I, § 8, of the Constitution.

The record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by appellants and by others, is shipped in interstate commerce. There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.

Appellees do not contest the fact that the statute thereby burdens, to some extent at least, interstate commerce in shrimp caught in waters off the South Carolina coast. Again, however, they rely on the fact that the commerce affected is in fish rather than some other commodity. They urge that South Carolina, because of its ownership of the shrimp, could constitutionally prohibit all shipments to other States. It follows, they imply,

[38] See note 13 *supra*.

that the State could impose lesser restrictions, such as those here at issue, on out-of-state shipments.

There is considerable authority, starting with *Geer* v. *Connecticut,* 161 U. S. 519 (1896), to support the contention that a State may confine the consumption of its fish and game wholly within the State's limits. We need not pause to consider whether this power extends to free-swimming fish in the three-mile belt, for even as applied to fish taken in inland waters it has been held that where a State did not exercise its full power, but on the contrary permitted shipments to other States, it could not at the same time condition such shipments so as to burden interstate commerce. In *Foster Packing Co.* v. *Haydel,* 278 U. S. 1 (1928), the Court held it was an abuse of discretion for a district court not to enter an order temporarily enjoining, as an unconstitutional burden on interstate commerce, enforcement of a Louisiana statute which permitted the shipment of shrimp from Louisiana to other States only if the heads and hulls had previously been removed. In distinguishing the *Geer* case, the following comment was made:

> "As the representative of its people, the State might have retained the shrimp for consumption and use therein. . . . But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the State is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause."[2]

[2] 278 U. S. 1, 13.

In *Johnson* v. *Haydel*, 278 U. S. 16 (1928), the same conclusion was reached, on the basis of the *Foster Packing Co.* case, as to a similar statute relating to oysters.

Similarly in the present case, South Carolina has not attempted to retain for the use of its own people the shrimp caught in the marginal sea. Indeed, the State has been eager to stimulate interstate shipments and sales as a means of increasing the employment and income of its shrimp industry.[40] Thus even if we assume that South Carolina could retain for local consumption shrimp caught in the maritime belt to the same extent as if they were taken in inland waters, the *Geer* case would not support § 3414.

In upholding this statute, the court below adduced a reason not advanced by appellees, that the requirements as to docking, unloading, packing, and affixing a tax stamp were a proper means of insuring collection of the ⅛¢ a pound tax.[41] But the importance of having commerce

[40] See note 30 *supra*. The District Court thought that the *Foster Packing Co.* and *Johnson* cases had been rendered inapplicable to this case by *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422 (1936). The California statute which the Court upheld in that case, however, was of a far different type than the one with which we are now dealing. The statute in effect limited the number of fish which could be reduced to fish flour as apart from those processed or sold in other forms. In rejecting the appellant's argument that the statute unconstitutionally burdened interstate commerce, the Court said that "It in no way limits or regulates . . . the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local." 297 U. S. 422, 425–26.

[41] The District Court also said that the requirements of § 3414 were a reasonable means of maintaining the good reputation of products originating in South Carolina. But the appellees do not pretend that the statute results in better preservation of the shrimp in healthful form. Moreover, since shrimp caught off the shores

between the forty-eight States flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax.

Thus we hold that § 3414 violates the commerce clause of Art. I, § 8 of the Constitution.

To sum up, we hold that the District Court had jurisdiction to entertain the attacks pressed by the individual appellants, but not the corporate appellant, on all the statutes save the one relating to income taxes; that South Carolina has power, in the absence of a conflicting federal claim, to regulate fishing in the marginal sea; and that in § 3374 of the South Carolina Code, though not in §§ 3379 and 3414, the State has exercised that power in a manner consistent with restraints which the Constitution imposes upon the States. The District Court's judgment refusing equitable relief is affirmed with respect to § 3374 and the income tax statute and reversed with respect to §§ 3379 and 3414.

Affirmed in part and reversed in part.

MR. JUSTICE BLACK concurs in the judgment of the Court and all of the opinion except part *Fifth*.

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of South Carolina are indistinguishable from those taken off the shores of neighboring States, purchasers would have no reason to suppose that shrimp packed in Georgia, if inferior, were products of South Carolina.

SUPREME COURT OF THE UNITED STATES

No. 415.—October Term, 1947.

Earle J. Toomer, et al., Appellants, v. J. M. Witsell, et al.	Appeal from the United States District Court for the Eastern District of South Carolina.

[June 7, 1948.]

Mr. Justice Frankfurter, whom Mr. Justice Jackson joins, concurring.

Barring the portion entitled *Fourth* I join the Court's opinion. While I agree that South Carolina has exceeded her power to control fisheries within her waters, I rest the invalidity of her attempt to do so on the Commerce Clause. The Court reaches this result by what I deem to be a misapplication of the Privileges-and-Immunities Clause of Art. IV, § 2, of the Constitution.

To regard any limitation upon the Privileges-and-Immunities Clause as "some unexpressed exception" and not give any clue to the basis on which such an "exception" may be implied is to leave the matter too much at large. It deals with the Constitution as though its various clauses were discrete and not a coherent scheme for government. Specifically, the Privileges-and-Immunities Clause, like the Contract Clause, must be put "in its proper perspective in our constitutional framework." *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, 232.

Like other provisions of the Constitution, the Clause whereby "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" must be read in conjunction with the Tenth Amendment to the Constitution. This clause presupposes the continued retention by the States of powers

that historically belonged to the States, and were not explicitly given to the central government or withdrawn from the States. I think it is fair to summarize the decisions which have applied Art. IV, § 2, by saying that they bar a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens or by discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens. It is not conceivable that the framers of the Constitution meant to obliterate all special relations between a State and its citizens. This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.

When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over its fisheries, and it is this common understanding that was reflected in *McCready* v. *Virginia*, 94 U. S. 391. The *McCready* case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the *McCready* doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the *McCready* doctrine by referring to "the regulation or the

distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Truax* v. *Raich*, 239 U. S. 33, 39–40.

But a State cannot project its powers over its own resources by seeking to control the channels of commerce among the States. It is one thing to say that a food supply that may be reduced to control by a State for feeding its own people should be only locally consumed. The State has that power and the Privileges-and-Immunities Clause is no restriction upon its exercise. It is a wholly different thing for the State to provide that only its citizens shall be engaged in commerce among the States, even though based on a locally available food supply. That is not the exercise of the basic right of a State to feed and maintain and give enjoyment to its own people. When a State regulates the sending of products across State lines we have commerce among the States as to which State intervention is subordinate to the Commerce Clause. That is the nub of the decision in *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1. South Carolina has attempted such regulation of commerce in shrimp among the States. In doing so she has exceeded the restrictions of the Commerce Clause.

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[June 7, 1948.]

Mr. Justice Rutledge, concurring.

I agree with the result and the Court's opinion, subject to one interpretation or qualification of the opinion's Fifth part.

The requirement that owners of boats fishing in the maritime belt dock at a South Carolina port, unload, pack, and stamp their catch (for tax purposes), before "shipping or transporting it to another state," is not merely a regulation of commerce burdening it in the sense of materially increasing the shipper's costs. Many valid regulations of commerce do this. The regulation in question goes farther. It is aimed in terms directly at interstate commerce alone, and thus would seem to be discriminatory in intent and effect upon that commerce. Moreover, in my opinion, it is of such a character that, if applied, for all practical purposes it would block the commerce.

Since it was exactly that sort of state regulation the commerce clause was designed to strike down, I agree that this one cannot stand. The same considerations I also think would be applicable to nullify the license fees levied against nonresidents, since upon the record their transportation of catches would seem to be exclusively in interstate commerce, or practically so.